IN THE MATTERS OF the Complaints made by Ms. Laurene Wiens (formerly Brandle) of Sudbury under the Ontario Human Rights Code, R.S.O. 1980, c. 340, as amended, and the Human Rights Code, 1981, S.O. 1981, c. 53, as amended, alleging discrimination in employment by Inco Metals Company, Ontario Division, Copper Cliff, Ontario, their servants and agents.

A HEARING BEFORE: Peter A. Cumming, Q.C.

APPEARANCES: Ms. Janet Minor, counsel for the Ontario Human Rights Commission

Ms. Janice Baker and Mr. Robert Little, counsel for the Respondent

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I. The Evidence.

The Respondent, INCO Limited, (hereafter "Inco") is a multinational corporation, incorporated in Canada and with its head office here. It operates a nickel refinery at Copper Cliff, Ontario, known as the 'Copper Cliff nickel refinery' (hereafter, "CCNR"), set up in 1973, at a cost of more than $140 million.

The Complainant, Ms. Laurene Wiens (her married name is "Brandle") has been employed at the CCNR since June 3, 1974, being one of the first women employed by Inco at the CCNR. For the most part she has worked as a labourer in the yard. At the time of the hearing she was working as a hot metal operator.

As a central part of the overall CCNR complex (see Exhibits #11 and #12), Inco has a physical plant structure of buildings and technology which utilize an innovative technique developed by Inco called the "Inco Pressure Carbonyl process" for the recovery of pure nickel from a variety of nickel-bearing feed materials. This sector of the overall CCNR is referred to as the "IPC". Inco also operates a nickel refinery at Clydach, Wales, that uses the same process. It predates the CCNR at Copper Cliff. These two refineries represent the only two in the world to use the "Inco Pressure Carbonyl process".

The 33-acre site at the CCNR houses two major process plants, the converter plant (responsible for the "feed" preparation of metallic granules to the IPC) and the IPC process plant. (See Exhibits 12 and 17). A "view" taken at the

beginning of the hearing was very helpful in comprehending the size, nature, and complexity of the CCNR complex.

The converter plant takes the nickel sulphide crudes resulting from the mining and refining operations of Inco, and converts them into dry metallic granules which are supplied to the IPC.

The IPC process consists of using carbon monoxide at atmospheric pressure and temperatures below 200 degrees F. to react with nickel granules, forming a colourless gas known as "nickel carbonyl". The reaction is then reversed by heating the nickel carbonyl to temperatures of about 400 degrees F., to yield pure nickel and carbon monoxide. Ultimately, the nickel is produced in the form of nickel pellets and nickel powder for shipment to industrial customers.

The overall process is quite complex, involving several stages. As the carbon monoxide and nickel carbonyl gasses are highly toxic, extreme care for the safety and health of the workers at the IPC is required. Environmental controls include a totally enclosed IPC process that constantly recycles all process reagents. The IPC is divided into several compartmentalized areas, each with an independent air supply. There is an incinerator system through which process wastes are channelled and cleaned. The IPC plant is equipped with atmospheric monitoring systems to alert the operators in the event of a gas escape. The IPC plant's atmosphere is changed completely 6 to 10

times every hour, with extensive monitoring of the air at some 53 points as it exhausts from the building.

There is a central control room where an operator checks constantly the screens giving the monitor readings. The roof monitors detect a toxic gas at 1 to 2 parts per billion parts of air. A very accurate "chemalescent reactor" monitor that is specific to the monitoring of carbonyl gas is used in the process areas of the IPC. A less specifically sensitive monitor is used in the office area, which monitor is sometimes triggered by new paint or cleaning agents in the area. Thus, the office area shows occasionally recorded alarms (Exhibit # 23), but in fact upon investigation on each occasion, no carbonyl leakage was present. In fact, the offices area to date has been carbonyl free 100% of the time (Exhibit #'23).

Moreover, an alarm is sounded in the control room if the monitor detects toxic gas at 4 parts per billion. The myriad of working parts, and the sheer overall size of the operation (some 66 miles of piping with more than 15,000 valves, more than 80% of which contain toxic gas) means that there is inevitably an occasional leak of carbonyl gas, which triggers the monitoring system to alert the operators, and requires necessary repairs to be made quickly.

There are extensive precautions taken in the design and operation of the IPC. All the joints in the IPC's apparatus are checked once weekly. A type of propane torch and a type of chemical stick are used by operators to detect leakage. For

maintenance, when an operator has to "go into" (such as opening a flange) the system, he does so using an independent, self-contained "air breathing system", and does not breathe the IPC plant's air while working. Similarly, when leaks are being repaired, the workers use an independent "air breathing system".

If there is a reading of 50 parts of toxic gas per billion parts of air, then there is an evacuation of the IPC plant.

Statistics were filed (Exhibit #13) to show the leaks of gas in each year of operation. There are certain areas within the IPC which are considered hazardous. Therefore, in the opinion of Inco's management, it is the job classifications which require a significant amount of time in these areas that are identified as excluding a "female of child-bearing potential" (Exhibit # 16). It is this exclusionary employment policy of Inco that has given rise to the Complaint before this Board of Inquiry. Statistics were filed indicating the "carbonyl free-time" in respect of the various sectors of the IPC (Exhibit # 18). As well, the breakdown by location of leaks within the IPC was given, together with the "exposure ratio", meaning the average chance of exposure based on each employee working 20 shifts per months (Exhibit # 20A).

There is not a wide variation from year to year. In 1984, for example, there were 29 leaks with a reading of over 50 parts per billion, and 391 leaks under 50 parts per billion. However, due to the diffusion of gas from a leak at the work level to the point that it activates a monitor in the roof, the exposure of a

worker may well be slightly greater than the dosage shown by the recorded roof monitors. However, given that the air in the IPC is turned over some ten times an hour, when a leak occurs at the work level it will be only a few seconds to a minute or so at most before a roof monitor is triggered at one or two parts of gas per billion parts of air. Therefore, while the dosage at the work level may be higher than the recorded level shown by the roof monitor, the roof monitor will alert the workers quickly as to the danger.

Mr. R.A. Bale, manager of the CCNR complex, testified that the causes of leaks fall within four categories (see item #22 in Exhibit #22), however in at least 80% of the leak situations the workmen will be utilizing the "independent breathing system" during repairs or maintenance. There is not, of course, exposure in such instances. It is only the 10% to 20% of leaks due to "normal wear and tear of moving parts" and "human error" where there would be exposure. However, both Mr. Bale and Dr. Peter J. Ryan of Inco testified that it is in respect of these last-mentioned two categories that about one-half of the most serious leaks (monitor readings in excess of 50 parts of gas per billion parts of air) occur.

The toxicity of nickel carbonyl gas occurs because when inhaled, the body's heat (in the nostrils and lungs) causes some decomposition of the gas resulting in two things: first, a chemical poisoning from nickel and second, a release of carbon monoxide and poisoning of the bloodstream.

Nickel carbonyl gas can have both acute and chronic effects. When ingested, it passes through the blood stream and most membranes. It is taken up by most organs and once there it breaks down into fine metallic nickel particles. It is believed that it is converted at this point to "nickel divalent" and that this is the toxic moiety. The general scientific theory, as expressed by Dr. Randall C. Baselt, an expert witness, is that the divalent nickel interacts with the macro molecular structure with a two-fold impact: first, there can be a change in the way affected cells function, and second, there can be a change in the way affected cells replicate.

Nickel carbonyl is excreted from the body by exhalation, and (in the form of fine metallic nickel particles) through the urine and feces.

The National Association of Safety and Health specifies that the threshold measurement considered to constitute a threat to the health of an individual is 50 parts of nickel carbonyl gas per billion parts of air over an eight hour period. The IPC plant of Inco is operated on a basis that there is to be no detectable level of nickel carbonyl gas.

Although a leak at the IPC may on occasion give a reading near the source of the leak of as many as 100 parts of gas per billion parts of air, a worker would not be exposed to the gas (due to the monitoring, alarm and evacuation system) for no more than a couple of minutes, at the very most.

When there has been exposure, a worker is withdrawn and given a breathalizer and urine sample check immediately (and 8 hours later, as well). If the readings show a significant level of nickel elevation in the urine for that worker over his usual reading (data being kept on file for every worker as to his 'normal' reading), then an antidote (dithiocarbonate) is administered to quicken the body's flushing of nickel through the urinary system. As well, the worker will be given oxygen to flush carbon monoxide from the bloodstream.

Exhibit #14 was filed showing the statistics in respect of nickel carbonyl exposure by employees as evidenced by urine samples. In 1984, for example, 29 precautionary urine samples were taken, which resulted in 12 carbonyl exposures confirmed for which medical treatment was not suggested, and 5 for which the exposure was confirmed and the antidote administered. In the years 1973 to 1985, there have only been three hospitalizations for exposure, and they were precautionary. There have been no deaths at the CCNR resulting from exposure.

Inco provides a comprehensive booklet on "Nickel Iron Carbonyls (Information On Their Properties and Plant Handling Procedures)" (Exhibit #27) to its IPC department employees, as part of its emphasis upon health and safety. This booklet relates the "threshold limit value" (or T.L.V.) referring to airborne concentrations of substances in respect of which "workers may be repeatedly exposed day after day without adverse effect", for nickel carbonyl as set by the American Conference of

Governmental and Industrial Hygienists, as being 50 ppb. However, CCNR standards are set such that action to prevent exposure is taken at the lowest detectable level (Exhibit #27, pp. 3). Other materials are used and disseminated (Exhibits #28, #29, #30 and #31) which indicate on the one hand, that sound safety and health measures will render the risk of nickel carbonyl poisoning minimal, while on the other hand, failure to take adequate measures for protection can have the most serious consequences. A Texas case study circulated to Inco supervisors (Exhibit #30) relates the story of a worker who died four days after exposure to the gas.

I have no doubt in concluding from all the evidence that Inco operates its CCNC complex, and IPC plant component in particular, in as safe a manner as possible for its workers. Moreover, so far as can be established, there are no discernible long term adverse effects resulting from exposure of the workers at the IPC. That is, the medical evidence given suggested that workers at the IPC were not at greater risk to their long term health than non-IPC workers.

The issue in the present Complaints does not, of course, question the safety record of Inco at the IPC. Indeed, that record seems to be exemplary. The Complainant asserts that there is a discriminatory aspect to Inco's overall safety measures in that since 1976 (Exhibit #6), Inco has made an internal policy decision that females of an age of "child-bearing potential" will not be permitted to work in virtually all of the job positions

within the IPC plant. This employment policy position was taken, and is maintained, on the basis of advice from the medical director at Inco, that there are "potential health hazards to unborn children in pregnant women both from nickel carbonyl itself and medication given for carbonyl exposure". Inco's position was reaffirmed in November, 1981 (Exhibit #15) and again in February, 1982 (Exhibit #16) with only a slight modification, in respect of job classifications (#156 Loader CCNR - see Exhibits # 15 and #16).

Although women worked throughout the World War II years at Inco's Clydach, Wales nickel refinery, there are no known statistics or studies on damage to fetuses from carbonyl gas. There are no known problems due to the employment of women of "child-bearing potential" (Exhibit #23). The Clydach refinery has not had women workers in its 'IPC' area for some years, and apparently has not had applications for employment in this part of its operations. However, the Clydach management reportedly agrees with the CCNR's management, that women of an age of child bearing potential should not be allowed to work in the IPC area.

One or two women who have been employed in the office area of the IPC within the CCNR office area, have given birth to children, with no apparent problems. However, as mentioned above, the office area of the IPC has a record of being 100% free of carbonyl gas.

Clearly on the evidence, the Respondent's restrictive employment policy in respect of females at the IPC has resulted

in the denial of the opportunity for advancement by the Complainant over the years. Ms. Wiens is a young woman, and is therefore considered by Inco to be an age of "child-bearing potential". She successfully completed her initial training in 1975 to work in the IPC, but with the promulgation of Inco's policy in 1976 excluding women of childbearing potential from the IPC, she has not been able to gain a position at the IPC. She has been denied the opportunity to work in the IPC plant, and the evidence suggests that she has the ability to be trained to work in positions there, and that on a seniority basis, but for the policy of Inco, she would have obtained a position at the IPC over the years. Moreover, she asserts that Inco's policy has denied her the opportunity of occasionally being able to do overtime work as a labourer in the packaging and shipping area of the IPC.

As a result, she claims (Exhibit #2) that she has been discriminated against unlawfully in contravention of paragraphs 4 (1) (c), (e) and (g) of the Ontario Human Rights Code, 1980, S.O. 1980, c. 340, as amended (hereafter, the "old Code"). These provisions read as follows:

"4 (1) No person shall,

...

(c) refuse to train, promote or transfer an employee;

...

(e) establish or maintain any employment classification

or category that by its description or operation excludes any person from employment or continued employment; (or)

...

(g) discriminate against any employee with regard to any term or condition of employment,

...

because of ... sex ... of such person or employee."

The Complainant's first Complaint (Exhibit #2) is dated November 20, 1981, and hence, is governed by the "old Code". I was appointed as a Board of Inquiry to hear and decide that Complaint (Exhibit #1).

As well, the Complainant made a new, separate Complaint (Exhibit #4) under the Human Rights Code, 1981, S.O. 1981, c. 53, (which came into force June 15, 1982) as amended (hereafter called "the Code") claiming that the Respondent is in continuing breach of subsection 4(1) and section 8 thereof, or in the alternative, is in breach of sections 10 and 8 and subsection 4(1) thereof. I have also been appointed as a Board of Inquiry to deal with this Complaint. These provisions of the Code read as follows:

"4. (1) Every person has a right to equal treatment with respect to employment without discrimination because of ... sex ...

...

8. No person shall infringe or do, directly or indirectly, anything that infringes a right

under this Part.

...

10. A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances; or

(b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right."

The Respondent asserts that if there is prima facie unlawful discrimination under the Code (which it denies), then at the least, the Respondent has a defence under section 23(b) or section 10(a) because, the Respondent asserts, its employment requirement restrictive in respect of female employees of child bearing potential is a reasonable and bona fide qualification.

Paragraph 23(b) reads:

"The right under section 4 to equal treatment with respect to employment is not infringed where,

...

(b) the discrimination in employment is for reasons

of ... sex ... if the ... sex ... of the applicant is a reasonable and bona fide qualification because of the nature of employment;"

Similarly, the Respondent asserts that, at the least, it has a defence under subsection 4(6) of the old Code which reads:

"(6) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on ... sex ... do not apply where ... sex ... is a bona fide occupational qualification and requirement for the position or employment."

Such defenses under either Code can be conveniently abbreviated and referred to as "r.b.f.q." defenses (for "reasonable and bona fide qualification", though the statutory wording of the defence changes slightly in each instance).

Inco's concern is in respect of the impact of carbonyl gas upon a fetus. Mr. R. A. Bale, Manager of the CCNR complex, agreed that if a female employee at the IPC became pregnant while working there, that she could be accommodated throughout the rest of her pregnancy by working elsewhere within the overall CCNR complex. However, Inco's concern is that an embryo might be exposed to the carbonyl gas before the realization of a pregnancy. That is, a situation where a female employee does not yet realize that she is pregnant, coupled with an exposure to an accidental emission of carbonyl gas, is the only situation to which Inco's policy is really directed.

Moreover, while some women do work as clerks or secretaries within the office sub-compartment within the overall IPC plant, these women run a much lesser risk to any significant exposure than a female employee in an operating position within the IPC plant. Mr. Bale testified that, for example, an employee doing simple maintenance on a pipe might inadvertently open the wrong pipe, resulting in exposure. Mr. Bale's point is that for operators there is a certainty of occasional exposure, which may be severe and while this will not directly harm the employee (who can take the antidote), the impact upon a fetus is uncertain, both in respect of the impact of the gas itself and also, in respect of the antidote taken by the female worker.

Dr. Peter J. Ryan, a chemist, and Mr. Bale's predecessor as manager of the CCNR complex, testified. He stated that Dr. K. H. Hedges, the then medical director for Inco, made the recommendation in 1976 to the then safety manager for Inco, N.C. Hillier, that led to Inco's restrictive employment policy at the IPC. (See Exhibit #20). Dr. Ryan testified that in 1979 he discussed the policy with the then medical director, Dr. Woytchuk, and on his advice, coupled with the advice of the joint company - union safety committee, re-articulated but maintained the policy (Exhibit #15), with a slight modification for one job classification made in 1981.

The foundation of Inco's discrimination in respect of the employment of women of child-bearing potential in the IPC department rests upon the research of American scientists, in

particular, that of Dr. F. W. Sunderman, of the Department of Laboratory Medicine, University of Connecticut School of Medicine, Farmington, Connecticut. A former colleague of his, and a co-researcher and co-author in respect of some of the articles, Randall C. Baselt (Ph.D., Pharmacology), now with the Chemical Toxicology Institute in Foster City, California, testified as an expert in toxicology on behalf of the Respondent. His expertise is impressive, as evidenced by the fact that over the past twenty years he has testified in more than 500 hearings on the toxicity of various drugs. Moreover, Dr. Baselt's services have been utilized in several occasions by medical officers of corporations in the United States when there have been acute nickel carbonyl exposures.

Dr. Baselt's extensive curriculum vitae was filed as Exhibit #32. He testified as to the probable effects of nickel carbonyl poisoning upon fetuses, and the probable effects of use of the antidote, or orally-administered chelating agent, diethyldilheocarbonate (dithiocarb) (hereafter "DTC"), upon fetuses. Dr. Baselt headed a research project in respect of the effect of DTC in rats suffering from nickel carbonyl toxicity (see Exhibits #36, #37).

There was considerable evidence of a scientific and medical nature, both in the form of references to scientific literature and by way of expert evidence.

Inco's position is that the fetus of a female worker at the IPC would be at significant risk if the pregnant female were to

be exposed to nickel carbonyl gas through an accidental leak. The perceived danger only applies to a worker while she has an unknown pregnancy, because presumably knowledge of the pregnancy would cause her to request a transfer out of the IPC which Inco has stated it would accede to.

Inco has adopted this policy on the advice of its medical officer, which advice Inco asserts, is in turn supported by the scientific literature.

Dr. Robert Francis is the present medical director for Inco. He heads a firm, "MEDCAN", that specializes in providing medical services for a large number of sizeable Canadian corporations. The services include providing medical surveillance programs with the objective of having healthy workers in a safe workplace and more traditional services of getting the injured or ill worker back to good health and productivity. Dr. Francis and Inco emphasize preventive medicine, and Dr. Francis has introduced new medical surveillance approaches, in particular, through periodic blood counts of organs ("end organs") in respect of which nickel particles are deposited through the inhalation of nickel carbonyl.

Dr. Francis' opinion is that Inco's policy is consistent with that taken by industries generally. That is, where there are work areas of relatively higher risk to workers, appropriate safety and health standards and measures are necessary. In his view, management and the industrial hygienic department of Inco identify the high risk area on the basis of where there is a risk

of leakage of toxicants. Dr. Francis emphasized that the problem with nickel carbonyl (Ni(CO)4) is that there can be an unrealized, sudden and high dose. It is not a situation where there is a risk due to the cumulative effect of a low level of exposure over a prolonged period of time. There is a possibility of a sudden exposure above an acceptable level. Dr. Francis relies upon the research studies of Drs. Sunderman Sr. and Jr.. Dr. Francis emphasized that Inco has to base its policy upon an extrapolation of the findings of the research upon animals.

Dr. Francis spoke of the different problem of exposure to other chemicals, for example, benzene, by a pregnant female. The toxic effect of benzene comes from its cumulative effect through prolonged exposure. Therefore, when a female in the workplace is known to have become pregnant, she is informed of the risk and can move to a benzene free environment before there is any possibility of prolonged exposure.

Exhibit #33 is a study (published in 1979) by a research group of scientists who determined in an experiment that the exposure of pregnant rats to inhalation of nickel carbonyl on days 7 to 8 of gestation frequently causes the pregnancy to develop ocular anomalies, including anophthalmia and microphthalmia. Thus, they conclude that "it seems prudent to control even brief occupational exposures of women of childbearing age to inhalation of Ni(CO)4." (p. 552 of Exhibit #33).

Dr. Baselt, one of the four participants in the research, recited the details and conclusions of the study in his oral testimony.

However, Dr. Evert Nieboer, an expert called by the Ontario Human Rights Commission, was to later make serious criticisms of the study underlying Exhibit #33. He sees the results of the study as a "warning" of "potential" teratogenic effects in respect of rat fetuses, but not "conclusive" evidence. He offered criticisms that the dosages (and said the U.S. Environmental Protection Agency had the same criticism) resulted in too many deaths amongst the dams, such that the fetuses may have been adversely affected by the sick mother rather than the $Ni(CO)_4$ itself. Dr. Nieboer felt that the incidence of malformations in the species generally should have been considered. Dr. Nieboer also felt that the lab equipment (which he had seen) used in the experiment is inadequate ("just glass jars") and that sophisticated equipment is now available. Finally, even if $Ni(CO)_4$ is teratogenic for rats, he is skeptical that there is a probable effect on human fetuses, claiming that much more evidence would be needed.

Exhibit #34 is another study (published in 1980) headed by Dr. Sunderman, Jr., who also headed the group that did the study written up in Exhibit #33. The study which is the subject of Exhibit #34 determined that $Ni(CO)_4$ is teratogenic and embryotoxic in Syrian hamsters, with several malformations resulting in the progeny of the exposed pregnant hamsters. They

conclude that "[t]hese findings suggest the possibility of teratogenic effects upon human fetuses, as a consequence of ... exposures of pregnant women to nickel compounds" (p. 232 of Exhibit #34).

Dr. Nieboer was even more critical of this study than that seen in Exhibit #33. He viewed the data as suggesting that the Syrian hamsters used were "more sensitive" than rats. Again, he saw the study as at most an inconclusive "warning" of possible problems for humans.

Exhibit #35 represents a further study, also headed by Dr. Sunderman, Jr.. The first part of the experiment again found that exposure of pregnant rats "to inhalation of $Ni(CO)_4$ causes frequent fetal malformations" (p. 7 of Exhibit #35). A second component of the experiment determined that male rats "exposed to inhalation of $Ni(CO)_4$ did not have impaired rates of fertilization nor did their progeny sustain increased pre-implantation or post-implantation losses" (p. 6, Exhibit #35). This finding, Inco asserts, supports its view that human fetuses are not affected by the fact that the sperm inducing conception is that of a male who has suffered exposure to $Ni(CO)_4$.

Dr. Nieboer allowed that Exhibit #35 was the best, from the standpoint of scientific procedures being followed, of the three studies reviewed to this point (Exhibits #33, #34 and #35). However, while he felt that there was no measurable evidence of embryotoxicity due to the male rats being exposed, the evidence did not go so far as to evaluate the issue of teratogenic

effects. Moreover, Dr. Nieboer felt that the results in respect of male rats and their progeny could not be easily extrapolated to humans, and that empirical evidence should be gathered in respect of male workers accidentally exposed to Ni(CO)4 through such means as sperm tests. Dr. Nieboer concluded that he was unconvinced by the existing studies, and that both male and female workers were potentially at the same risk in so far as the effect of exposure from a teratogenic basis is concerned.

Two studies headed by Dr. Baselt (Exhibits #36 and #37) considered in part the matter of the efficacy of DTC as an orally-administered chelating agent, or antidote, for nickel carbonyl toxicity in rats. Both studies concluded that DTC is effective as an antidote.

Dr. Nieboer was very skeptical about these studies, asserting that there was evidence that exposed individuals not given DTC sometimes had the same recovery rate as those receiving DTC, and that, on balance, the evidence is not clear that DTC is in fact an antidote or that it is even necessary to have an antidote. Dr. Nieboer's general criticism in respect of these studies (as with those seen in Exhibits #33, #34 and #35) is that much more could be done in the way of data collection, and that the authors are really "standing still", accepting the present dogma of scientists re both Ni(CO)4 and DTC. He believes that his review of all the literature as set forth in his comprehensive report on "The Technical Feasibility and Usefulness of Biological Monitoring in the Nickel Producing Industry" of

January, 1984, supports his opinion. Dr. Nieboer is truly a critical scientist who refuses to accept the shibboleths of the day, and wants to test all premises. However, Dr. Nieboer ultimately allowed, that given the present state of scientific knowledge, it appears DTC helps to release nickel into the urine, and he himself would recommend DTC to a seriously exposed worker. Dr. Nieboer's criticism really is that the existing knowledge is very inadequate in that not nearly all possibilities for further insights have been researched.

Dr. Stephen Spielberg, an Associate Professor at the University of Toronto, is an expert in fetal development and toxicology. His research focuses upon the mechanisms by which drugs can cause adverse effects in humans.

Birth is indeed, a miracle. Dr. Spielberg stated that 1/5 to 1/4 of all pregnancies abort within three weeks of conception without the female even realizing there is a pregnancy. A further 15% of pregnancies spontaneously abort in the first trimester. Of the live births, only 3% of such babies have major defects, and of these, only 10% are due to environmental causes, including physical agents (for example, radiation) infections, and drugs or chemicals. Some 25% of births with major defects are due to known genetic or chromosome deficiencies and 65% of births with major defects are uncertain in origin, or due to accidents or appear multi-factoral in cause. Very few drugs cause defects to a majority of babies. Thalidomide, Acutaine and Dilantin are examples of drugs that do.

Inherent to the policy decision-maker is the assessment of risk, comparing the risk to the exposed person as against the risk of the entire population. Dr. Spielberg emphasized that just about any compound (even sugar!) in a large enough dosage to any species will cause defects. He is very concerned about the efficacy of the Drs. Sunderman studies, given the high incidence of illness and death in the maternal animals. Were the problems to the fetus a result of chemical impact upon the fetus, or the result of having an ill mother? He was of the opinion that the dosage should have been dropped to the point where there was no maternal toxicity. Moreover, in his view research on a species, such as monkeys, with an eye more human-like, would have been more meaningful. Finally, Dr. Spielberg felt the research was incomplete, in not showing what happens to fetuses exposed to the antidote. All in all, he saw the research as simply "a red flag for more studies".

Dr. Spielberg criticized the research. He feels there is just not enough evidence, as yet. First, there is a great difference from species to species, the kinetics and metabolism being different, and there is often a genetic difference in end-organ targets of a given chemical or drug. There are significant differences as between species in respect of placenta permeability, the metabolism of placenta, and the rates at which organs develop in different species.

The Sunderman studies showed that rats exposed to nickel carbonyl suffered eye defects. Dr. Spielberg stated that the

concern raised by Exhibit #33 is that with an isolated, specific (eye) defect, there is a suggestion of a possible critical period during the pregnancy in respect of the danger of exposure. Moreover, further concern was raised with the research indicating two species to be harmed by exposure. (Exhibits #33 and #34).

Dr. Spielberg questioned the absence of any defects in the control groups, as a normal rat population would have some incidence of defects in the ordinary course of events. He wondered also about the fact that there was no reference one way or the other as to the presence of folic acid which often causes eye defects in fetuses of rats and mice.

Dr. Spielberg faulted Exhibit #35 because the exposure was through intravenous injection.

In Dr. Spielberg's opinion, compared to other compounds, the studies in respect of Nickel Carbonyl put the chemical "way down the list" of drugs with any significant risk. Dr. Spielberg also felt the studies as to the efficacy of the chelating agent to be insufficient.

David Halton, who has a Phd. in mechanistic toxicology, also testified on behalf of the Commission. He teaches in the Faculty of Medicine, University of Toronto, and is also an industrial toxicologist with the Canadian Centre for Occupational Health and Safety, in Hamilton. His expertise is in the interaction of atoms and molecules with chemicals, and his research and study includes possible influence of chemicals in causing defects,

abnormalities and diseases in newborn children. His curriculum vitae was filed as Exhibit #54.

His Centre in Hamilton did an extensive review of major medical literature as to the evidence in respect of chemicals and teratogenisis.

To the surprise of those at the Centre no direct correlation was found. Although the literature on toxicology had considerable evidence as to a terategenic effect of chemicals upon rats, this only arose at levels of dosages that caused toxicity in the mother rats, and represented an abnormal workplace situation. There were only two case histories which suggested a teratogenic phenomenon, and neither involved nickel compounds. Dr. Halton emphasized that notwithstanding a great deal of public concern, the scientific evidence does not suggest that teratogenisis due to industrial chemicals is a significant workplace problem. He stated that at normal dosage levels occurring in the workplace there was very little evidence of a teratogenic outcome. At accident, or high exposure levels, all life is equally at risk, not just the fetus.

Dr. Halton stressed that "toxicity" describes the inherent potential of a chemical to cause harm, whereas "hazard" connotes a dangerous situation requiring safeguards and controls. The degree of toxicity is, of course, part of the evaluation of the hazard. In Dr. Halton's opinion, many people carelessly blur the two notions, such that once there is "toxicity" a hazard is intuitively perceived. However, while a hazard constitutes a

potentially serious event, with safeguards the risk of there actually being an accident is generally very remote. He emphasized that the true, essential question for judgment by the regulator is the degree of risk present. By way of analogy, he referred to the industrial use of vinyl chloride, a known carcinogen. Its industrial use is not precluded; safeguarding controls are mandatory which render the workplace safe.

Dr. Halton, who had viewed the IPC complex of Inco, was very impressed by the management and control of the potential hazard due to nickel carbonyl. Given the evidence, he felt that an evaluation of the risk constituted by the hazard, rather than an evaluation of the toxicity of Nickel Carbonyl, suggests that there is no significant hazard and the policy re females of child-bearing potential is unduly restrictive.

However, assuming the policy of Inco to be very conservative, the question must remain as to whether an employer, like Inco, has the right to reduce the insignificant risk even further provided the employer is acting in good faith. If Inco were to adopt a policy at the other extreme which compelled pregnant women to work in the IPC and did not allow them to transfer out, it would, of course, be met with much greater criticism. Must Inco adopt a policy that offers the female of child-bearing potential age the choice?

Dr. Halton would even allow pregnant women to work in the IPC. He implied that a pregnant woman would have about the same risk of harm to her fetus from driving to work or of falling

while walking on company property, as from Nickel Carbonyl exposure. Dr. Halton stressed that there is no clear evidence that Nickel Carbonyl is a true teratogen, and even if it is, the controls imposed mean that you can still work safely with it. However, on cross-examination he allowed that given the animal research and the uncertainty as to whether Nickel Carbonyl might be a teratogenic, that perhaps Inco's policy might be reasonable.

How does one distinguish in respect of the risk taking through exposure to Nickel Carbonyl from the many other risks pregnant women take? Society permits pregnant women to drive or ride in motor vehicles. Pregnant teachers are allowed to take the risk of exposure to children who may have measles. Inco allows occasional visitors to its IPC plant who may, unknowingly, be pregnant.

Physicians will prescribe Acutaine, a drug that is used by young people as a remedy for some forms of severe acne. This drug can have a severe teratagenic effect upon a fetus, yet is still given to a female of child bearing potential if she attests to following a relatively safe form of birth control, is made aware of the risks, and acknowledges that she must not become pregnant for at least two or three months after ceasing to take the drug. There are cases of women who, not realizing they are pregnant, have taken Acutaine, with resulting malformed fetuses.

Inco does not apparently require any parts of its workplaces to be cigarette smoke free, although inhaled smoke is harmful to both the smoker and to others in the vicinity. Nor has Dr.

Francis recommended the adoption of such a policy. It was admitted by Dr. Francis that the published research conclusively establishes that human fetuses are put at some significant risk through exposure to cigarette smoke. Yet not only is a pregnant female worker allowed to accept that certain risk (indeed, to smoke herself, if she wishes) but she does not have the right as an employee to demand a smoke-free environment. It is at the discretion of management whether or not to accede to her request for a change of venue.

I cite the above examples, because on the evidence, it is my view that the risk to a fetus of an accidental nickel carbonyl exposure to the mother and the risk of harm due to the administration of the antidote, is a much lesser risk than the other cited situations. However, even though there is some risk of harm, Inco's policy is arguably too demanding, in requiring a female to have reached menopause or to be sterile. It would suffice to make females aware of the risk, and require females to state that they practice birth control, and upon their either intending to become pregnant or unintentionally becoming pregnant, requesting a work reassignment beyond the IPC area.

II. <u>The Law</u>.

There are several issues that arise.

(1) Does discrimination against a particular group of females (those only of "child bearing potential") constitute

discrimination within the meaning of the Code, when all women generally as an entire group are not being discriminated against?

(2) If there is a risk to a fetus through the female working in the IPC, is it her right under the Code to decide that she (and she on behalf of the child) will accept this risk if she becomes pregnant, and is it unlawful discrimination to not employ her notwithstanding her decision to accept the risk?

(3) What is the sufficiency of risk standard required to constitute a r.b.f.q. defence for an employer and is the standard met in the instant situation?

(4) If there is a breach under the Code, then are the provisions of the old Code different such that there is not also a breach thereunder?

1. The Legal Position of the Parties.

The Complainant must show a prima facie case of discrimination as a result of the Respondent's exclusionary rule. Ms. Brandle's complaint was initially brought under subsection 4(1) of the old Code and she subsequently brought an additional complaint under the new Code. The Complainant must satisfy the onus of showing that the Respondent engaged in a discriminatory practice by refusing to employ the Complainant in the plant because of the Complainant's sex, a prohibited ground of discrimination under section 4 of the old Code and/or under subsection 4(1) or paragraph 10 (a) of the new Code.

Once the Complainant has established a *prima facie* case of discrimination, the onus shifts to the Respondent to show that the exclusionary policy is based on a r.b.f.q. under subsection 4(6) of the old *Code* and under paragraph 23(b) or paragraph 10(a) of the new *Code*. If the Respondent satisfies this onus the discrimination is then not prohibited and the exclusionary policy will not be unlawful discrimination.

2. *A Prima Facie Case of Discrimination*

This novel issue concerns whether an exclusion of females of child bearing potential from the workplace constitutes discrimination on the basis of sex. There is no case law that deals directly with this subject. Therefore, an analysis of the law concerning discrimination on the basis of pregnancy provides a useful analogy. The Respondent's first line of asserted defenses in respect of the Complaints was that where a distinction is made on the basis of pregnancy, the distinction is not sex discrimination. The Respondent asserts that because its exclusionary policy only comprehends a sub-group of women (those of child-bearing potential) it does not discriminate because of sex.

A. *Pregnancy in the Workplace and Employment Benefits - The Bliss Standard*.

There has been considerable debate as to whether discrimination on the basis of pregnancy constitutes

discrimination on the basis of sex. Generally, it has been held that it does not. Several Boards of Inquiry have deferred to the Supreme Court of Canada decision in Bliss v. Attorney-General of Canada ((1979), 92 D.L.R. (3d) 417). In that case, the Plaintiff alleged that she had been discriminated against on the basis of sex when she had been denied unemployment benefits because her termination of employment was due to pregnancy. The plaintiff had not worked enough weeks to be eligible for pregnancy benefits but had worked enough weeks to be eligible for regular benefits. Ritchie, J. said that "Any inequality between the sexes in [pregnancy and childbirth] is not created by legislation but by nature" and adopted the statement of Pratte, J. in the Federal Court of Appeal ((1977), 77 D.L.R. (3d) 609, at 613), that pregnant women are treated differently because they are pregnant, not because they are women, (Bliss at 422).

Subsequently, in Leier v. CIP Paper Products Ltd., (Sask. Board of Inquiry, January 5, 1978, - Norman; application for prohibition denied, CIP Paper Products Ltd. v. S.H.R.C.; May 29, 1978, Sask. Q.B.) a pregnant woman who had had to take time off work because of pregnancy complications was denied sick benefits under the employee illness and disability insurance plan. The Board said:

> To exclude pregnancy-related disabilities from coverage under an employee disability protection plan is, surely to engage in an act of sex discrimination. This is because men do not face a risk of pregnancy. (Leier at 9.)

However, the Board felt it was bound by Bliss, and therefore decided ultimately that denial of sick benefits because of pregnancy was not discrimination on the basis of sex.

In Gibbs et al. v. Bowman et al., (July 11, 1978, B.C. Bd. of Inquiry (Hebenton)), the Board held that denial of sick leave benefits to employees who were absent from work because of pregnancy was not discrimination on the basis of sex. The Board had difficulty with the fact that not all women are pregnant all the time.

> The sentence "No person shall discriminate on the basis of sex" does not suggest pregnancy. The quoted sentence means to most people that they must not distinguish between male and female. It does not suggest that the prohibition applies to the distinction between females who are pregnant and females who are not pregnant. (Gibbs at 5)

The Board was concerned about the effects of holding that discrimination on the basis of pregnancy is prohibited.

> If pregnancy is equated with sex, then some curious and unfortunate results can arise. For example, there is a general rule of employment law that an employer may discipline (and in some circumstances dismiss) an employee for refusal to obey instructions given within the course of employment. I think that it would be wrong to discipline an 8-month pregnant firefighter for refusal to enter a burning building, and it would be wrong to discipline an 8-month pregnant ski instructor for refusing to lead the Canadian National Ski Team on a downhill course. (Gibbs at 5)

However, while in such example situations it would be reasonable for an employer to assert that not being pregnant is a r.b.o.q., it does not at all follow that an employer should be able generally to discriminate because of pregnancy. As well, in my opinion, these examples are somewhat far-fetched. Most women

are not employed in such physically demanding jobs. There are almost no female firefighters, let alone pregnant female firefighters. Most athletes choose not to get pregnant unless they are prepared for an interruption in their careers. The majority of women are in much less active occupations where their ability to adequately perform their duties would not be hampered by a normal pregnancy. The purpose of the Code was to do away with such broad stereotypical assumptions about classes of people and to require employment decisions to be based on individual assessments of each employee's capabilities.

Furthermore, the Board's concerns ignore the fact that discrimination on prohibited grounds is permitted where certain attributes constitute a r.b.o.q. Thus, rather than exclude pregnancy or the potential to become pregnant from the ambit of sex discrimination it should be examined case by case whether such discrimination consists of a r.b.f.q.. Non-pregnancy would be a reasonable and bona fide occupational qualification in many physically dangerous occupations. Discrimination on the basis of pregnancy in occupations that are not physically dangerous is not, in my opinion, justified.

The Quebec Provincial Court in Breton v. Metaux Reynolds ((1981), 2 C.H.R.R. D/532), has also held that treating pregnant women differently is not discrimination on the basis of sex. It said that discrimination on the basis of sex implies treating women differently from men, not treating pregnant women differently from non-pregnant women. Although the Court was

sympathetic with the plight of the plaintiff who had been refused a secretarial position because she was pregnant, the Court believed that to hold that this was discrimination on the basis of sex would amount to judicial amendment of the law.

In Brooks et al v. Canada Safeway Ltd. a Manitoba court recently upheld a human rights tribunal's decision that the reasoning/Bliss applied to Manitoba human rights' complaints in the absence of an expanded statutory definition in respect of "discrimination by reason of sex". (1986) 7 C.H.R.R. D/3185 at D/3188 (Q.B. Div.) (appeal pending).

In my view, with respect, no amendment of the law should be necessary to hold that discrimination on the basis of pregnancy is discrimination on the basis of sex. In Rand v. Sealy Eastern Ltd., (June 14, 1982, Ontario Bd. of Inquiry (Cumming)), discrimination against an Orthodox Jew by a corporate employer owned and managed by others of the Jewish faith, was held to be discrimination on the basis of creed. An employee training program was arranged to be held on Saturdays which the Complainant, who observed Saturday Sabbath, was unable to attend. Although only the Orthodox Jew who observed Sabbath was discriminated against, it was still held to be discrimination on the basis of creed. Likewise, although only some women get pregnant, to discriminate against such women is still discrimination on the basis of sex.

B. Departures from the Bliss Standard.

In Tellier-Cohen v. Treasury Board, ((1982), 3 C.H.R.R. D/792, appeal (4 C.H.R.R. D/1169) in which a Review Tribunal upheld the finding of discrimination on the basis of pregnancy being sex discrimination), a Board of Inquiry held that discrimination because of pregnancy did constitute discrimination on the basis of sex. The Complainant had been denied permission to use her annual leave and accumulated sick leave for the purpose of childbirth. The Board cited Ritchie J.'s comment in Bliss, (Bliss at 422) that women are treated differently because they are pregnant, not because they are women, but did not follow it, saying that it was obiter, (Ritchie J. based his decision in Bliss on the finding that the government had a "valid federal objective" in treating pregnant women differently). The Board said:

> I cannot subscribe to this obiter dictum, for it creates a separate sexual category for pregnant women and avoids dealing with the real problem of sexual discrimination. Only women can become pregnant and this is the major difference between men and women. (Tellier-Cohen v. Treasury Board, (1982), 3 C.H.R.R. D/792 at D/794.)

The primary difference between men and women is in their respective reproductive roles. The Board continued:

> Judging the equality of the sexes on the basis of strict equality (which the Americans call "gender-based discrimination") constitutes a substantive defect for there are no decisions except in situations where men and women are in exactly identical positions. Pregnant women provide a good illustration of the illogical nature of that criteria. Only women can become pregnant; must we accept for that reason that they must be deprived of the benefits which would otherwise be granted? (Tellier-Cohen at p. D/794.)

The Board found that pregnancy-based discrimination constituted discrimination on the basis of sex within the meaning of section 3 of the Canadian Human Rights Act, S.C. 1977, c.33, as amended, because of the disproportionate impact on women.

The reasoning in Bliss was also rejected in Holloway v. MacDonald (1983), 4 C.H.R.R. D/1454. This case was followed on this point in Paton v. Brouwer and Co. (1984), 5 C.H.R.R. D/1454 at D/1460.) The decision held the termination of the Complainant's employment to be without reasonable cause and thus in violation of the British Columbia Code. In light of this result, Professor Black's analysis of Bliss was not necessary to the result. Notwithstanding, his comments merit attention. Professor Black distinguished Bliss as it dealt with the Bill of Rights, R.S.C. 1970, App. III, s.1(b), under which the question concerned the validity of a statute.

The Canadian Human Rights tribunal rejected the reasoning that pregnancy discrimination was not sex discrimination due to not all women being pregnant at the same time. The Board also held against the argument that if pregnancy is included within the term "sex", employers would be unable to exempt women who were pregnant from certain job functions.

> ...[T]he Code would not prohibit an employer from basing decisions on the ground that this particular employee's condition prevented her from performing essential parts of the job as long as that conclusion were based on an individual assessment rather than generalizations about pregnant women. One can speculate that there may be circumstances in which there would be reasonable cause to exclude all pregnant women. The facts of this case do not present such circumstances, however, and in view of the prevalence

> of misconceptions about pregnancy, "common sense" may not be a good guide in determining how frequently, if ever, such circumstances would arise. (Holloway v. MacDonald (1983), 4 C.H.R.R. D/1454 at D/1460.)

Mr. Justice Walter Tarnopolsky, in Discrimination and the Law (W.S. Tarnopolsky, Discrimination and the Law, 1985, p. 8-19) concludes that the issue of pregnancy discrimination must be taken to be open until resolved by the Supreme Court of Canada. In support of this he states that the Bliss interpretation of the equality clause in the Bill of Rights has been departed from in MacKay v. The Queen, ([1980] 2 S.C.R. 370; 114 D.L.R. (3d) 393) and specifically over-taken by the Charter of Rights and Freedoms, sections 15 and 28. In addition he states that the Bliss ruling that pregnancy is not discrimination on the basis of sex is an obiter dictum in relation to a different statute involving different considerations and consequences. Finally, Justice Tarnopolsky points out that "it has never been a prerequisite to a finding of discrimination that all members of the class or category be equally affected". (Tarnopolsky at p. 8-15.)

In my opinion, the views of Mr. Justice Tarnopolsky in respect of Bliss are correct. Recent B.C. human rights tribunals have also taken this approach. In Davies v. Century Oils (Canada) Inc. and Production Supply Company Ltd., a B.C. tribunal rejected an employer's argument that not being pregnant is a bona fide occupational requirement because it would be costly to replace the female employee while she was absent for childbirth reasons (1987) 8 C.H.R.R. D/3770 (B.C. Human Rights Council). The B.C.

Human Rights Council considers that it is not bound by the obita dictum of Ritchie, J. in Bliss that discrimination because of pregnancy is not discrimination because of sex. See, for example, Stifanyshyn v. 4 Seasons Management Ltd., carrying on business as 4 Seasons Racquet Club (1987) 8 C.H.R.R. D/3934 (B.C. Human Rights Council).

C. Statutory Response.

Alberta, Quebec, Saskatchewan, the federal government, and recently Ontario, have enacted legislation which provides explicitly that discrimination because of pregnancy is sex discrimination. In Alberta, The Individual's Rights Protection Act was amended in 1980 by S.A. 1980, c. 27, s. 27, to include "pregnancy" to the list of prohibited grounds in section 6 concerning employment discrimination.

The Quebec Charter of Human Rights and Freedoms was amended in 1982 (by L.Q. 1982, c. 61) to include pregnancy as a prohibited ground of discrimination. In the 1979 Saskatchewan Human Rights Code, section 2(o) defines "sex" as meaning "gender" and, "unless otherwise provided in the Act, discrimination on the basis of pregnancy or pregnancy-related illnesses is deemed to be discrimination on the basis of sex. The Canadian Human Rights Act (S.C. 1980-81-82-83, c. 143, as amended) subsection 3(2) stipulates: "Where the ground of discrimination is pregnancy or childbirth, the discrimination shall be deemed to be on the ground of sex".

The Ontario Code was amended in December, 1986, to the same effect. Subsection 9(2) reads:

> 9.(2) The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

This amendment is subsequent to the factual situations set forth by the Complaints before this Board. The amendment clearly states that discrimination because of sex includes discrimination because a woman "may become pregnant", that is, is of child-bearing potential age. There is nothing in the legislative history leading to this amendment to indicate whether it was seen as being 'for greater certainty' or whether it was seen as necessary to reform the law.

In light of the novelty of this issue in Canadian jurisprudence it is helpful to also compare the American and English decisions on point.

D. The United States - Discrimination on the Basis of Sex Includes Pregnancy.

American case law has wavered on the point of whether or not discrimination against pregnant women is discrimination on the basis of sex. Initially, the courts had decided that it was, until the Supreme Court's decision in General Electric Co. v. Gilbert, infra, clearly said that it was not. The courts then proceeded to distinguish and narrow Gilbert until Title VII of the Civil Rights Act was amended in 1978, declaring that "sex" included pregnancy.

In Wetzel v. Liberty Mutual Insurance Co., (511 F. 2d 199 (1975)), the plaintiff contested a private income protection plan that provided employees with income while they were unable to work because of disability or illness, but excepted pregnancy from its coverage. The Court rejected the defendant's arguments that pregnancy was voluntary while other disabilities were not, and its argument that pregnancy was not a "sickness".

> Appellant, in justification of this policy, argues that because pregnancy is voluntary and illnesses are not, pregnancy can be excluded from its income protection plan. We disagree. Voluntariness is no basis to justify disparate treatment of pregnancy. There are a great many activities that people participate in that involve a recognized risk. Most people undertake these activities with full knowledge of the potential harm. Drinking intoxicating beverages, smoking, skiing, handball and tennis are all types of activities in which one could sustain harm.
>
> According to the Liberty Mutual's policy, all disabilities that could result from the above activities are covered under the income protection plan. Even if we were to accept appellant's argument of voluntariness, we find that some voluntary disabilities are covered while one voluntary disability that is peculiar to women is not so covered. Either way we find no support for appellant's argument. Moreover, pregnancy itself may not be voluntary. Religious convictions and methods of contraception may play a part in determining the voluntary nature of a pregnancy. There is no 100% sure method of contraception, short of surgery, and for health reasons many women cannot use the pill. This court will not accept "voluntariness" as a reasonable basis for excluding pregnancy from appellant's income protection plan.
>
> Appellant next contends that the plan covers only those disabilities arising from sickness, and since pregnancy is not a sickness it is properly excluded from coverage. Again we disagree. We believe that pregnancy should be treated as any other temporary disability. Employers offer disability insurance plans to their employees to alleviate the economic burdens caused by the loss of income and the incurrence of medical expenses that arise from the inability to work.

> A woman, disabled by pregnancy, has much in common with a person disabled by a temporary illness. They both suffer a loss of income because of absence from work; they both incur medical expenses; and the pregnant woman will probably have hospitalization expenses while the other person may have none, choosing to convalesce at home.
>
> Thus, pregnancy is no different that any other temporary disability under an income protection plan offered to help employees through the financially difficult times caused by illness.
>
> Under Liberty Mutual's plan nearly all disabilities are covered. We believe that an income protection plan that covers so many temporary disabilities but excludes pregnancy because it is not a sickness discriminates against women and cannot stand. (511 F. 2d 206 (1975))

The Court also rejected Defendant's arguments that the "increased cost for pregnancy benefits would be 'devastating'". The Defendant provided no evidence of this. The Court found that this income protection plan discriminated against women on the basis of sex.

The Court also struck down the Defendant's mandatory maternity leave which required women to remain away from work for three months after delivery and permitted a maximum six-month leave. A woman who was absent for more than six months due to pregnancy lost her job. Both the mandatory three-month leave and the maximum six month leave were held to be discrimination on the basis of sex, because employees absent because of other temporary disabilities were not subject to similar rules.

The Court continued:

> Pregnancy, as a temporary disability, must be treated no differently than any other disability. We are not requiring appellant to give to women any more than it already gives to men. Since appellant provides

leaves for all temporary disabilities, it must also provide leaves for pregnancy on the same basis.

...

In essence Liberty Mutual has two leave policies - one for pregnancy and one for other temporary disabilities. Since pregnancy is a disability common only to women, to treat it differently by applying a separate leave policy is sex discrimination. Liberty Mutual argues that since most women are recovered within six weeks and that most women do not return to work after childbirth, the company is justified in maintaining the present maternity leave policy. We disagree. This attitude is precisely what Congress intended to strike down. Discrimination based on stereotypes or overly categorized distinctions between man and women are forbidden by Title VII.

...

The legal standard articulated by the EEOC requires that women be considered on an individual basis on their own particular capabilities and not on "characteristics generally attributed to the group." 29 C.F.R. ss. 1604.2(a)(1)(ii). A policy, therefore, that is founded on generalizations, such as most women after giving birth are fully recovered within six weeks, or that most women do not return to work after giving birth, is discriminatory because it makes no provision for considering individual capabilities. Appellant's maternity leave policy, requiring all women to return to work within three months or be fired, penalizes women because of a physiological condition found only in their sex. There is no leeway under this leave policy to ascertain individual capabilities or characteristics. As the district court properly found, Liberty Mutual's policy bears "no relation to the fitness of any individual female to perform the functions of her job." (372 F.Supp. at 1161.) One woman may be physically and mentally prepared to return to her job within the arbitrary time limit, while another, although wishing to return, may be unable to do so because she has not fully recovered. We believe that a leave policy that in essence operates as two distinct policies, one affecting only women, cannot stand under Title VII. A maternity leave policy that is applied to one sex only, that is based on class generalizations of that sex, and that treats pregnancy different from other temporary disabilities, is not permitted under Title VII. (511 F.2d 207-8 (1975))

Thus, pregnant women are to be assessed according to their individual capabilities, not according to stereotypes. The Court declined to consider whether the Defendant could raise a defence of business necessity because the defendant raised this issue for the first time on appeal and presented no evidence to back its claim.

In Hutchison v. Lake Oswego School District No. 7, (519 F.2d 961 (1975)) the Court held that Title VII was violated when a teacher was denied sick leave benefits for a fifteen day absence due to childbirth. The Court said:

> Title VII...proscribes classifications which "in any way would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [her] status...(519 F. 2d 964 (1975).)

Although denial of sick benefits does not adversely affect a woman's employment opportunities it does "otherwise adversely affect her status". The Court deferred to the Equal Employment Opportunity Commission guidelines which advised that discrimination against pregnant women is discrimination on the basis of sex.

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same

> terms and conditions as they are applied to other temporary disabilities. (29 C.F.R. ss. 1604-10(b))

The Court rejected the Defendant's assertions that the costs of paying out sick benefits would increase dramatically if pregnancy-related disabilities were protected.

> ...administrative costs which might justify an employment practice for purposes of equal protection, would not necessarily constitute an adequate defence under Title VII. (Hutchinson, at 966.)

In Jacobs v. Martin Sweets Co., Inc., (550 F.2d 364 (1977), certiorari denied 97 S.Ct. 2180) an executive secretary to a senior vice-president had been transferred to a position as a junior clerk because she was unmarried and pregnant. The Court held that this amounted to constructive dismissal on the basis of sex. The Court rejected the Defendant's argument that she had not proven that she would have been treated differently from an expectant male parent.

> The sophistry of this argument is that it equates pregnancy with the condition of "expectant parent" in a male. Pregnancy is a condition unique to women, so that termination of employment because of pregnancy has a disparate and invidious impact upon the female gender. The point is not well taken, for it would effectively exclude pregnancy from protection in all Title VII cases. (Jacobs at 370.)

The Court was clearly of the opinion that pregnancy should not be excluded from Title VII protection.

The Supreme Court, however, thought differently. In General Electric Co. v. Gilbert, (429 U.S. 125 (1976)) the plaintiff contested an employee disability plan that covered all non-occupational sicknesses and disabilities except for pregnancy. The Court held that this was not discrimination on the basis of

sex because the distinction was made between pregnant persons and non-pregnant persons, the latter category including both men and women. (Gilbert at 135.) The Court also held that pregnancy could not be categorized as a disease because it was "voluntary". (Gilbert at 136.) The Court upheld the freedom of insurers to choose what risks to insure.

> The Plan, in effect..., is nothing more than an insurance package, which covers some risks, but excludes others. ...The "package" ...covers exactly the same categories of risk, and is facially non-discriminatory in the sense that" [t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."... For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits accruing to men and women alike, which results from the facially evenhanded inclusion of risks. (Gilbert at 138-9.)

Subsequent cases have distinguished this case as being limited to situations relating to private insurance plans.

Brennan J., in his dissent, argued persuasively that discrimination against pregnant women is discrimination on the basis of sex. He considered General Electric's other discriminatory practices against women as evidence of a discriminatory motive behind its decision to exclude pregnancy from insurance protection. He said:

> Surely it offends common sense to suggest ... that a classification revolving around pregnancy is not, at the minimum, strongly "sex-related". (Gilbert at 49.)

He questioned the alleged neutrality of the plan saying that the Court is obliged:

> ...to determine whether the exclusion of a sex-linked disability from the universe of compensable disabilities was actually the product of neutral, persuasive actuarial considerations, or rather stemmed from a policy that purposefully downgraded women's role in the labour force. ...the Court simply disregards a history of General Electric practices that have served to undercut the employment opportunities of women who become pregnant while employed. Moreover, the Court studiously ignores the undisturbed conclusion of the District Court that General Electric's "discriminatory attitude" toward women was a "motivating factor in its policy" ... and that the pregnancy exclusion was "neutral [neither] on its face" nor "in its intent". (Gilbert at 149-50.)

Although Brennan, J. did not question the Court's assumption that pregnancy is "voluntary", he did point out that other voluntary disabilities were protected by the plan.

> [T]he characterization of pregnancy as "voluntary" is not a persuasive factor, for as the Court of Appeals correctly noted, "other than for childbirth disability, [General Electric] had never construed its plan as eliminating all so-called 'voluntary' disabilities", including sport injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery. (Gilbert at 151.)
>
> ...
>
> [A]lthough all mutually contractible risks are covered irrespective of gender ... the plan also insures risks such as prostatectomies, vasectomies, and circumcisions that are specific to the reproductive system of men and for which there exist no female counterparts covered by the plan. (Gilbert at 152.)

Brennan, J. also commented on the effect that the exclusion of pregnancy from the protection of this plan had on women's opportunities to succeed in the workplace.

> [P]regnancy exclusions built into disability programs both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labour force. (Gilbert, at 158.)

The purpose of the Civil Rights Act is to remove artificial barriers such as these, from the workplace.

Stevens J., in his dissent, pointed out that the discrimination is not between pregnant persons and non-pregnant persons but rather between those who are capable of becoming pregnant and those who are not.

> [T]he rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male. (Gilbert at 161-2) (emphasis added).
>
> ...
>
> Insurance programs, company policies, and employment contracts all deal with future risks rather than historic facts. The classification is between persons who face a risk of pregnancy and those who do not. (Gilbert at 161, fn. 5.)

Most women of working age face a risk of pregnancy. Therefore, any rule that discriminates against pregnant women, potentially discriminated against most women.

In Nashville Gas Co. v. Satty, (434 U.S. 136 (1977)) a discriminatory seniority policy was challenged. Female employees who were absent due to pregnancy lost all their accumulated seniority and were forced to take a cut in pay on being rehired. Employees who were absent for other reasons lost no seniority and were not forced to take a cut in pay. Rehnquist J., writing for the majority, distinguished Gilbert.

> Here, by comparison, petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more that one of semantics. We held in Gilbert that ss. 703(a) (1) did not require

> that greater economic benefits be paid to one sex or the other "because of their differing roles in 'the scheme of human existence'" ...But that holding does not allow us to read ss. 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role. (434 U.S. 142 (1977). ss. 703(a) (42 U.S.C.A. ss. 2000e-2(a)(2)0 provides:
> 703(a) It shall be an unlawful employment practice for an employer -
> (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex ...,; or
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ...sex... .)

The Court held that the seniority policy discriminated on the basis of sex.

Sick leave benefits had also been denied and the facts in this regard were indistinguishable from the facts of Gilbert. The Court followed its decision in Gilbert but said obiter that had the plaintiff been able to show that the disability benefits plan, though neutral on its face, had a discriminatory effect, the Court would have found the policy to be discriminatory on the basis of sex.

In Eberts v. Westinghouse Elec. Corp., (581 F. 2d 357 (1978)) a number of pregnancy policies were challenged. Only employees absent due to pregnancy were denied the accrual of their seniority during their absence. The employer required employees to give advance notice of absences due to pregnancy but not of their other absences. Employees were required to have worked for the company for nine months to be able to take

pregnancy leave but there was no such requirement for other leaves. There was a mandatory maternity leave even for women willing and able to work. Women returning from maternity leave were often assigned to less favorable jobs than those returning from other leaves. The Court found that all these rules concerned conditions that imposed "substantial burdens on women that men need not suffer". The Court followed Satty, holding that all these conditions constituted discrimination on the basis of sex. However, with respect to the denial of sick benefits during absences due to pregnancy, the Court followed Gilbert, despite the fact the pregnancy was the only 'elective' disability excluded from the plan. The plan covered elective hernia operations, injuries resulting from fights, disability caused by drug abuse, alcoholism and accidents caused by drunk driving, but not pregnancy related absences.

In 1978 Congress amended Title VII to include:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, ...as other persons not so affected but similar in their ability or inability to work. (42 U.S.C.A. ss. 2000e(k).)

In Abraham v. Graphic Arts Intern. Union, (660 F.2d 811 (1981)) the employer ruled that any employee who took more than ten days sick leave in a row would be dismissed. The employment of a pregnant woman who took more than ten days off to give birth, was terminated. The Court found this to be discriminatory.

> Title VII declares it to "be an unlawful employment practice for an employer ... to discharge any individual ... because of such individual's ... sex." This means that, unless indispensably demanded by the job, the gender of an employee cannot be utilized as a factor in a discharge decision, or that the decision rested upon a characteristic peculiar to one of the sexes. Pregnancy and childbirth are, of course, phenomena shared only by women, and only female employees are susceptible to employment losses which may be tied to either. So, if an employer grants employees leave for any and all temporary physical disabilities except pregnancy, and restoration to the employee's former job upon the expiration of leave, it is apparent that women employees are subject to a "substantial burden that men need not suffer." Title VII outlaws any detrimental visitation on employees of either sex "because of their differing roles in 'the scheme of human existence'" by the same token, Title VII cannot be read "to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role." It follows that an employer extending job-reinstatement to employees generally after periods of temporary physical indisposition must pursue that policy equally when temporary disability is caused by pregnancy. (Abraham, at 817-8.)

The Court said further that an absolute ceiling on disability leave of ten days meant that any:

> ... jobholder confronted by childbirth was doomed to almost certain termination. Oncoming motherhood was virtually tantamount to dismissal, though other indispositions might well and usually would pose no threat to continued employment. In short, the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age --an impact no male would ever encounter. (Abraham at 819.)

This employee rule was intended to apply to all employees equally but had the effect of discriminating against pregnant women and the Court held that this constituted discrimination on the basis of sex.

E. The United Kingdom - Discrimination on the Basis of Sex Does Not Include Pregnancy.

In England discrimination against pregnant women has been held not to be discrimination on the basis of sex. In Turley v. Alders Department Stores Ltd., ([1980] I.R.L.R. 4 (Employment Appeal Tribunal)) the question arose for the first time. For the purposes of the appeal it was assumed that the plaintiff's employment had been terminated because she was pregnant. The Industrial Tribunal decided that this was not discrimination on the basis of sex under the Sex Discrimination Act 1975 ((1975), c.65, s.1 (U.K.)). The Tribunal accepted the Defendant's arguments that pregnancy is voluntary and that, as not all women get pregnant, to discriminate against a pregnant woman is not discrimination on the basis of sex.

> Although, generally speaking, all women may become pregnant, not all women do. When a woman becomes pregnant the reason she is pregnant is in a sense because she is a woman; if she was not she could not be pregnant. But additional factors, normally involving the exercise of free will on her part, are essential before she ceases to be simply a woman, and becomes pregnant, that is, becomes a woman carrying a child. Consider the case of an employer with three applicants for the same job, one a man, one a woman, one a pregnant woman. The employer does not select the pregnant woman because she is pregnant. Suppose he takes the other woman. Clearly he has discriminated against the pregnant woman, but because of her pregnancy, not because of her sex. What difference would it make to the ground on which he has discriminated against the pregnant woman if instead of choosing the other woman applicant he had chose the man?
>
> ...
>
> In order to see if she has been treated less favourably than a man the sense of the section is that you must

> compare like with like, and you cannot. When she is pregnant a woman is no longer just a woman. She is a woman, as the Authorised Version accurately puts it, with child, and there is no masculine equivalent. (Turley at 5.)

The Tribunal placed pregnant women in a category all by themselves and held that they were not protected by the Sex Discrimination Act 1975 (1975, c.65 (U.K.)).. The Employment Protection Act 1975 (1975, c.71, s.35 (U.K.)) has provisions guaranteeing the right to maternity leave and the right to receive the same job back on return from leave. However, to be protected by this Act the employee must have been employed for 26 weeks.

The dissent held that termination because of pregnancy was discrimination on the basis of sex.

> In my view it may or may not be unlawful under the Sex Discrimination Act to dismiss a woman on the grounds of pregnancy.
>
> The case under the direct discrimination provision - s.(1)(a) - is a simple one. Pregnancy is a medical condition. It is a condition which applies only to women. It is a condition which will lead to a request for time off from work for the confinement. A man is in similar circumstances who is employed by the same employer and who in the course of the year will require time off for a hernia operation; to have his tonsils removed; or for other medical reasons. The employer must not discriminate by applying different and less favourable criteria to the pregnant woman than to the man requiring time off.
>
> That is the 'like for like' comparison, not one between women who are pregnant and men who cannot become pregnant.
>
> The Industrial Tribunal should have asked:
>
> 1. Did Mrs. Turley's pregnancy incapacitate her in her job?

> 2. Would the employer have treated a man in similar circumstances differently - that is, a man requiring time off for a medical condition who is not incapacitated in his job?
>
> If the employer shows that the man would not be treated more favourably, then the Sex Discrimination Act would not give the woman protection. The answer rests on the facts and the test falls squarely within the terms of s. 1(1)(a). (Turley at 6.)

Thus, the dissent applied a broader test, suggesting the Tribunal compare the treatment of employees unable to work because of any disability rather than comparing the difference in treatment between female employees who are pregnant and male employees who cannot get pregnant, finding this an impossible comparison to make.

F. Arguments in favour of Including Pregnancy Within Sex Discrimination in the Code.

It can be argued that pregnancy is included within the definition of "sex" for the purposes of the Code for the following reasons.

(1) Immutable Characteristic.

The ability to get pregnant is an "immutable characteristic determined solely by the accident of birth". (Holloway v. Arthur Anderson & Co. 566 F. 2d 327 (1977) at 663). The different reproductive functions of men and women are the primary difference between them. People often quibble over whether there are or the extent of other differences between men and women but all must concede that their reproductive roles are not the same. To say that pregnancy is not a factor of sex -- gender -- is to ignore the major distinguishing feature between men and women. Only women are capable of getting pregnant. The primary discrimination on the basis of sex is discrimination on the basis of the respective reproductive roles of men and women. Discrimination against pregnant women is prima facie discrimination on the basis of sex.

(2) Not All Women Get Pregnant.

The fact that not all women are pregnant all the time in the same way that blacks are black all the time does not make pregnancy any less a factor of sex. First, virtually all women face a risk of pregnancy. Therefore, most women are potential discriminatees. (See the dissent of Stevens J. in Gilbert.) Secondly, in other discrimination cases the courts and boards have held that not every member of the class need be discriminated against for there to be discrimination against the class as a whole.

In Barnes (Barnes v. Costle 561 F. 2d 983 (1977), the Court said that the fact that not all female employees were sexually harassed did not made the sexual harassment of one female employee any less discriminatory on the basis of sex. In cases involving discrimination on the basis of creed, Boards of Inquiry have not required that the particular religious practice that was discriminated against be mandated by the tenets of the claimant's religion, (see, for example, Pritam Singh v. Workmen's Compensation Board Hospital (1981), 2 C.H.R.R. D/459) nor that it be adhered to by all members of the claimant's faith (see for example, Rand v. Sealy Eastern Ltd, supra). In cases involving discrimination on the basis of race there has been no requirement that the discrimination be against all members of that race. For example, in The Queen v. Drybones, [1970] S.C.R. 282, the Supreme Court of Canada, per Ritchie J., held that to treat Indians who were drunk off a reserve more harshly than whites drunk off a reserve or Indians drunk on a reserve was discrimination on the basis of race. Not all Indians get drunk and those who do do so voluntarily. Indians who do not get drunk and Indians who got drunk on a reserve were treated no differently than whites. It was only Indians who were drunk off a reserve who were discriminated against and yet the Supreme Court held that this was discrimination on the basis of race.

When the act of discrimination is only against part of the group the courts and boards have had no difficulty finding that it is discrimination on the basis of a characteristic of the

group as a whole. Therefore, although not all women get pregnant, discrimination against pregnant women is discrimination on the basis of a female's characteristic. Any Indian who chose to get drunk off a reserve would have been penalized for doing so. The fact that not all Indians chose to do so does not make it any less discrimination against Indians as a group. Any Jew who chooses to observe the Jewish Sabbath will suffer prima facie discrimination if he is prevented from doing so. The fact that not all Jews choose to observe their Sabbath does not make it any less discrimination against Jews as a class. Any woman who chooses to get pregnant may be discriminated against in employment for doing so. The fact that not all women choose to get pregnant does not make it any less discrimination against women.

This view is shared by Prof. James MacPherson, who disagreed with the reasoning in Bliss that the discrimination was between two classes of women rather than between men and women.

> In my view, this argument is not valid. The fact that discrimination is only partial does not convert it into non-discrimination. For example, federal legislation that treated some, but not all, Indians more harshly than whites would be discriminatory. Equally, an employer's decision not to hire a particular black solely because of his blackness would run afoul of provincial human rights legislation even though the employer hired other blacks. Legislation or the practice of individuals cannot be saved because they work only a partial discrimination. The legislation in Bliss works such a partial discrimination. Although most women are treated equally with men, a certain class, namely those women who are pregnant, are treated more harshly because they are pregnant. Since pregnancy is a condition unique to women, the legislation denies these women their equality before the law. By not recognizing this, and by concluding

> that differentiation on the basis of pregnancy is not sex-related, the Supreme Court of Canada has decided not to strike against one of the most long-standing and serious obstacles facing women in Canada, namely legislation and employer practices directed against pregnant women. (MacPherson, "Sex Discrimination in Canada: Taking Stock at the Start of a New Decade" (1980), 1 C.H.R.R. c/7, at c/11.)

To discriminate against a part of a group because of an additional characteristic that may not be common to all members of the group has been called "sex plus" discrimination in the United States. (See, for example, Willingham v. Macon Telegraph Publishing Co. 507 F. 2d 1084 (1975).) Pregnant women are discriminated against because they are female plus the fact that they are pregnant. As discussed, this type of discrimination has been held to be discrimination on the basis of sex.

(3) Purpose of the Code.

The purpose of both the old and the new Code is to prevent the assessment of persons according to stereotypical assumptions about the class to which they belong. Each person should be assessed according to his or her individual capabilities. Thus, rules that are at first appearance neutral but have the effect of discriminating against a particular class of persons have been struck down as discriminatory. (See, for example, Colfer v. Ottawa Board of Commissioners of Police, January 12, 1979, Ontario Board of Inquiry (Cumming).) Therefore, employment requirements and leave policies that appear neutral on their face but have the effect of discriminating against pregnant women would be discriminatory on the basis of sex.

Pregnancy does not affect all women the same way. Some women are able to work right up until they go into labour while a few women may be bed-ridden for almost the full nine months. To treat all pregnant women alike is discriminatory. The purpose of the Code is to curtail such unfair treatment of persons resulting from assumptions about the class as a whole. (See H.W. v. Kroff and Roviera Reservations of Canada Ltd., July 22, 1976, B.C. Board of Inquiry (Heberton).)

G. Summary re Discrimination on the Basis of Pregnancy.

It is my view that paragraph 10(a) of the new Code is also available to bring discrimination on the basis of pregnancy within the definition of discrimination on the basis of sex. The Ontario legislature, by including section 10 in the new Code explicitly provided for adverse effect or indirect discrimination. Thus, even if 'pregnancy' is not a prohibited ground of discrimination, the exclusion of pregnant persons from a particular employment, where such exclusion is not a r.b.f.q., results in discrimination on the basis of sex, as only women can be pregnant. (As mentioned supra, subsection 9(2) now deals expressly with the situation.)

Both the Plaintiff in Bliss and the Complainant in the instant case suffered prima facie discrimination because of female reproductive capacity classifications. Ignoring the disparate effect on women allows the employer to engage in systemic discrimination on the basis of an unquantified safety risk. However, as I have stated above, in my opinion,

discrimination on the basis of female reproductive capacity, whether it relates to pregnant women or to women with the potential to become pregnant, should be classified *prima facie* as discrimination on the basis of "sex". This allows for an educated assessment of the risks involved and for a recognition of the principle of equality. Procedurally, a complaint under paragraph 4(1) (c), (e) and (g) of the old *Code*, or under subsection 4(1) and section 8, or section 10, of the new *Code* is possible, with the employer then having to assert a r.b.f.q. defence under subsection 4(6) of the old *Code* and under paragraph 23(b) of the new *Code*.

The only case in Canada to date to deal with an issue similar to the one at hand is *Cassan et al.* v. *Hudson Bay Mining and Smelting Co.* (Federal Tribunal: February 28, 1985, unreported). The Tribunal dealt with an employment policy of the Respondent prohibiting the employment of women capable of bearing children in certain smelter positions as there was a perceived risk of injury to an unborn child due to lead contaminants. The Tribunal's decision dealt only with the issue as to whether there was a *prima facie* discriminatory practice: not whether that practice can be justified as a *bona fide* occupational requirement (p.16). The Tribunal held:

> We are unable to accept the Respondent's argument in that regard. While the result of the policy might be to protect the fetus, it is nevertheless a policy directed towards the employment of female persons either in their totality or in the class defined as female persons capable of child-bearing. In that respect, it marks a difference between men and women.

> A policy which is directed at all women capable of bearing children, or all women, is one which focuses on a distinct class of persons. The class is in no way restricted to those who intend to have children. In short, the Company's policy in that respect seems to say that women will be granted equal treatment in the work force only on the condition of, and at the price of, denying their role as mothers. If only women who never become pregnant are treated equally, then surely women as a class have been denied their full humanity. The Company's policy seems to say to women that if they want to be equal, then they must be the same as men and not have babies. The conclusion can be no different if the policy is directed to all female persons or to all female persons capable of bearing children.
>
> We do not have to decide whether discrimination based on pregnancy is discrimination based on sex. Here, the policy of the Company in its narrow interpretation is directed at the potential of pregnancy - to those women who are capable of bearing children. If women, who are capable of bearing children are not to be treated as full and equal partners in the work place, then women as a class are not equal and are immediately on an inferior footing in the work force.
>
> We have concluded that the Company's policy is discriminatory and constitutes discrimination based on sex.

In my opinion, both discrimination because of pregnancy, and discrimination because of "child-bearing potential" are discrimination "because of sex" within the meaning of both the old Code and the new Code (before the amendment in 1986, with the addition of subsection 9(2)). With the addition of subsection 9(2) in 1986 the new Code is, of course, express on this point.

3. A Prima Facie Case of Discrimination on the Basis of" Child-Bearing Potential".

In the instant case, the Complainant is alleging discrimination of the basis of sex due to the exclusion of females of child-bearing potential. This exclusion is actually broader than one based on actual pregnancy, as most women of working age risk pregnancy. By analogy to discrimination on the basis of pregnancy, this policy of exclusion should be seen *prima facie* as an intentional (although the motive is benign) act of sex discrimination under both the old *Code* and the new *Code*.

The instant situation can also possibly be considered, as argued by counsel for the Ontario Human Rights Commission, as one where an employment requirement or qualification results in a disparate impact on women and falls under section 10 of the new *Code* as a *prima facie* case of adverse effect or indirect discrimination. However, in my opinion, given that the restrictive employment requirement is expressly directed at women, the *prima facie* case of discrimination is correctly characterized as arising as an act of intentional discrimination under paragraphs 4(1)(c), (e) and (g) of the old *Code*, and under subsection 4(1) and section 8 of the new *Code*. This is not a situation of constructive discrimination.

The onus then shifts to the Respondent to prove that the exclusionary rule of all women of child-bearing potential is justified as a r.b.f.q. under subsection 4(6) of the old *Code* and paragraph 23(b) of the new *Code*.

Women in this special case can suffer from what has been called the "perils of protection" (Katherine Swinton, "Regulating

Reproductive Hazards in the Workplace: Balancing Equality and Health" 33 U. of T. Law Journal (1983), p. 72). The protective approach is to some extent based on sex role stereotypes premising that since women can bear children they will bear children. "Women have the right to be regarded as more than vessels for the next generation; at the same time, women who choose to bear children need protection from severe financial sacrifice if they refuse to work or are barred by the state or employers from working because of pregnancy." (Swinton at p.72.)

The employer may be acting with two motives; a desire to protect a potential fetus from physical damage and also a desire to protect the company from tort liability to a child born deformed. Balanced against these issues is the principle of equality of opportunity in the workplace. The Complainant in the instant situation has been barred from advancing in the company due to an accident of birth, specifically, that she has the potential to bear children. The issue is a particularly difficult one. Apart from sterilization there is not a known method of complete protection against pregnancy. No one method is 100% trustworthy and many women cannot take the pill, the most reliable method, for health reasons. Furthermore, the fetus is most susceptible to damage during the first trimester of development. Pregnancy cannot usually be detected until at least five days after a missed period. Thus, no matter how careful the employer is in keeping the work environment hazard free and no matter how careful the employee is in remaining not pregnant

there remains the possibility, however slight, that the Complainant could be pregnant without knowing and contemporaneously be exposed to a toxic chemical. Should these two events coincide, there may then be serious injury to the fetus.

4. A Reasonable and Bona Fide Qualification.

At this juncture it must be determined what constitutes a r.b.f.q. in law. Once again, a brief look at the American and English interpretations of the r.b.f.q. provision will be helpful.

A. United States - Bona Fide Occupational Qualification.

The Equal Employment Opportunity Commission Guidelines on sex discrimination provide a very narrow bona fide occupational qualification (b.f.o.q.) defence.

Section 1604.2(a) of the Guidelines outlines the exceptions:

> The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels - "men's jobs" and "women's jobs" - tend to deny employment opportunities unnecessarily to one sex or the other.
>
> (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
>
> > (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

> (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.
>
> (iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.
>
> ...
>
> (2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

The United States courts have been deferential to the EEOC Guidelines in this regard and the claims for the defence of a b.f.o.q. exception have generally fallen into two categories: "the ability to perform" qualification, and the "same sex" qualification.

The first qualification was considered in Weeks v. Southern Bell Telephone & Telegraph Company, (408 F. 2d 228 (1969), Fifth Circuit Court of Appeals). The Company had excluded women from the job of switchman on the basis that the job required the employee to lift weights over 30 pounds. The Court overturned the Trial Court's decision that this was a valid b.f.o.q. and set the standard for adjudication in like cases.

> We conclude that the principle of nondiscrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer

> has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.
>
> Southern Bell has clearly not met that burden here. They introduced no evidence concerning the lifting abilities of women. Rather, they would have us "assume", on the basis of a "stereotyped characterization" that few or no women can safely lift 30 pounds, while all men are treated as if they can. While one might accept, arguendo, that men are stronger on the average than women, it is not clear that any conclusions about relative lifting ability would follow. This is because it can be argued tenably that technique is as important as strength in determining lifting ability. Technique is hardly a function of sex. What does seem clear is that using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved. (emphasis added)

In Diaz v. Pan American World Airways, (442 F. 2d 285 (1971)), The Fifth Circuit Court of Appeals considered its own decision in Weeks. Diaz concerned the claim by the airline company that being female was a b.f.o.q. for the job of flight cabin attendant. This claim was rejected as females' alleged superiority at "soothing passengers" did not go to the essence of the job.

> We do not feel that this alone justifies discriminating against all males. Since, as stated, above, the basis of exclusion is the ability to perform non-mechanical functions which we find to be tangential to what is "reasonably necessary" for the business involved, the exclusion of all males because this is the best way to select the kind of personnel Pan Am desires simply cannot be justified. Before sex discrimination can be practiced, it must not only be shown that it is impracticable to find the men that possess the abilities that most women possess, but that the abilities are necessary to the business, not merely tangential. (442F. 2d. 388.)

The "same sex" b.f.o.q. has been argued on the basis of accommodating the personal privacy of clients and inmates. The jurisprudence suggests a restrictive set of exceptions.

There is a recent American case close on the facts to the one at hand. In Wright v. Olin Corporation et al, 585 F. Supp. 1447 (1984), Woodrow Wilson Jones, J. of the U.S. District Court, W.D. North Carolina, held that an employer's policy of excluding or restricting women access to certain jobs which involved exposure to chemicals which could be harmful to fetuses did not violate Title VII of the Civil Rights Act of 1964. The case had been remanded to the District Court by the Fourth Circuit Court of Appeals, 697 F.2d 1172 (U.S.C.A., 4th Cir. 1982). The Court of Appeal stated:

> Though the safety of women workers themselves might be thought the most obvious subject of necessary - hence legally justifiable - restrictions on their employment opportunities, the opposite of course has been held. Among the most obvious targets of the sex-discrimination prohibitions of title VII were those stereotypical assumptions about women workers' special societal role and physical and emotional vulnerabilities which had generated both "protective" laws and private practices restricting their employment opportunities. Rooting out those restrictions has required that they now be routinely justified under any of the business-related defenses. Accordingly, the general view when these defenses have been raised by employers has been that they must be rejected because "it is the purpose of Title VII to allow the individual woman to make [the] choice for herself" (at p. 1188).

The Court was of the view that an employer's "business necessity" defence would be asserted successfully if the employer could establish that the restrictive employment practice was "reasonably required to protect the health of unborn children of

women workers against hazards of the workplace" (at 1189, 1190). An employer would have to prove "significant risk of harm" by qualified expert evidence (at 1190), that the risk "is substantially confined to women workers" (1191) and while there need not be consensus in the scientific community, "that an informed employer could not responsibly fail to act on the assumption that this opinion [that there is a substantial risk of harm] mighty be the accurate one" (1191).

(Following the District Court decision, the Court of Appeal vacated that decision on the ground that because the plaintiff and her counsel, both of whom had unequivocally expressed their lack of interest in the fetal vulnerability issue, had been allowed to withdraw from the action, the case was not adequately represented, No. 84-1276, August 31, 1984, vacating and remanding 34 FEP Cases 1226, 585 F. Supp. 1447).

B. United Kingdom - Genuine Occupational Qualification.

The Sex Discrimination Act, 1975 in subsection 7(1) provides for a b.f.o.q. or r.b.f.q. exception "where being a man is a genuine occupational qualification for the job". The genuine occupational qualification is set out in subsection 7(2) and is quite expansive, including situations where "the holder of the job provides individuals with personal services promoting their welfare or education, or similar personal services, and those services can most effectively be provided by a man..." (Sex Discrimination Act (1975) s. 7(2)(e)).

C. Canadian Jurisprudence.

The r.b.f.q. defence has been discussed in Ontario boards of inquiry sex discrimination decisions as well as in other provinces. These tribunal decisions generally follow the restrictive American trend of defining the employment qualification as relating to ability to perform.

In the 1974 case of Shack v. London Drive-Ur-Self Limited (June 7, 1974, Ontario Board of Inquiry (Lederman)) a woman was denied a job as a rental clerk at a Hertz franchise because of the physical work involved in stripping down the trucks and the fact that the rental clerk would have to work alone in the evenings. Chairperson Lederman applied the reasoning in both the Weeks and Diaz cases. He found no evidence that the physical work in question was beyond the capabilities of all or substantially all women. Further, he recognized that the particular Complainant was found capable. Finally, he suggested the decision to accept the risk of working alone at night should be left to the Complainant.

Chairperson Lederman heard Segrave v. Zeller's Ltd. (September 22, 1975, Ontario Board of Inquiry) one year later, which involved a complaint of sex discrimination by a male whose application was rejected for a personnel manager trainee position because he was recently divorced. The Board defined the b.f.o.q. exception as applicable only where "discrimination based on sex affects the respondent's business as a commercial enterprise and

the primary function of the business or enterprise would be undermined by not hiring members of one sex exclusively". (p.13)

A third Ontario case, Boyd v. Mar-Su Interior Decorators Limited was heard in 1978. (February 22, 1978, Ontario Board of Inquiry (MacKay)). The male Complainant alleged discrimination on the basis of sex as the employer would not hire males to install drapes in purchasers' homes. Chairperson Mackay, in finding unlawful discrimination, suggested that r.b.f.q. exemptions in sex discrimination cases are "very exceptional and limited". (p.5)

The 1975 New Brunswick case of MacBean v. Village of Plaster Rock (November 6, 1975, New Brunswick Board of Inquiry (Kerr)) involved a complaint by a woman that she was denied an interview for the position of clerk treasurer even though she was well qualified. The Board held that sex was not a qualification for the job and the Complainant should be able to decide for herself whether the working conditions were unpleasant.

In Saskatchewan a "same sex" r.b.f.q. case was heard by the Saskatchewan Human Rights Commission. In Lindsay v. Girling and Provincial Protection and Security Agency (November 27, 1975, Saskatchewan Board of Inquiry: Taylor, J.) a male's complaint of sex discrimination was dismissed as the position he aspired to required a female security guard at an airport, who would be required to conduct body searches of female airline passengers. However, there is not an r.b.f.q. defence where an employer wants a female salesclerk just because most customers are female.

See McDevitt v. McMordie's Copper and Brass (1986) 7 C.H.R.R. D/3306 (B.C. Human Rights Council). Nor should a male be precluded from consideration for a position as a girls' physical education teacher. Rossi v. School District #57 (1986) 7 C.H.R.R. D/3237 (B.C. Human Rights Council).

D. The Etobicoke Test.

The bona fide occupational requirement was discussed in the Supreme Court decision concerning discrimination on the basis of age, Ontario Human Rights Commission et al v. Borough of Etobicoke ([1982] 1 S.C.R. 202). The two pronged test laid out in that case consists of both an objective and a subjective element. MacIntyre, J. speaking for a unanimous court stated (at p. 208):

> To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

This test was applied by the Supreme Court in Canadian National Railways Co. v. Bhinder and Canadian Human Rights Commission ([1985] 2 S.C.R. 561; 63 N.R. 185). This case established that safety could be the justification for a r.b.f.q., in which case consequential or indirect discrimination would not be unlawful.

Bhinder involved allegations of discrimination on the basis of religion. The Complainant, a Sikh, refused to wear a hard hat while working as an electrician and was forced to quit. The issue turned on whether there could be discrimination in the absence of intent and following an affirmative response to that question it was argued whether a hard hat was a r.b.f.q..

The Tribunal at first hearing found there was discrimination on the basis of religion and further, that the wearing of a hard hat did not constitute a r.b.f.q. with respect to Bhinder, although the policy was a sound one overall.

On appeal to the Federal court, the Tribunal's decision was overturned. The majority found there was no discrimination, absent any intention ([1983] 2 F.C. 531).

On final appeal to the Supreme Court of Canada it was held that the Canadian Human Rights Act encompassed adverse effect or indirect discrimination. Hence, the Federal Court of Appeal decision was reversed on this point. However, the majority in the Supreme Court of Canada dismissed the appeal on the basis that the requirement to wear a safety hat was a bona fide occupational requirement for the occupation Bhinder was employed in and no individual could be exempted.

The majority reached this decision by concluding that "but for its special application to Bhinder, the hard hat rule was found to be a bona fide occupational requirement" (Canadian National Railways Co. v. Bhinder and Canadian Human Rights Commission (1985) 63 N.R. 185, at p. 195). McIntyre, J., for the

majority, then considered whether an individual application of a bona fide occupational requirement is permissible or possible and concluded that it is not.

> The words of the statute speak of an "occupational requirement". This must refer to a requirement for the occupation, not a requirement limited to an individual. It must apply to all members of the employee group concerned because it is a requirement of general application concerning the safety of the employee. The employee must meet the requirement in order to hold the employment. It is, by its nature, not susceptible to individual application. The Tribunal sought to show that the requirement must be reasonable, and no objection would be taken to that, but it went on to conclude that no requirement which had the effect of discriminating on the basis of religion could be reasonable. This, in effect, was to say that the hard hat rule could not be a bona fide occupational requirement because it discriminates. This, in my view, is not an acceptable conclusion. A condition of employment does not lose its character as a bona fide occupational requirement because it may be discriminatory. Rather, if a working condition is established as a bona fide occupational requirement, the consequential discrimination, if any, is permitted - or probably more accurately - is not considered under s. 14(a) as being discriminatory. (Bhinder at p. 195-6)

With respect, I find the Chief Justice's interpretation, in dissent, to be more in keeping with the objectives of human rights legislation. He found the Tribunal's individual approach to be correct:

> The words "occupational requirement" mean that the requirement must be manifestly related to the occupation in which the individual complainant is engaged. Once it is established that a requirement is "occupational", however, it must be further established that it is "bona fide". A requirement which is prima facie discriminatory against an individual, even if it is in fact "occupational", is not bona fide for the purposes of s. 14(a) if its application to the individual is not reasonably necessary in the sense that undue hardship on the part of the employer would not result if an exception or substitution for the

> requirement were allowed in the case of the individual. In short, while it is true the words "occupational requirement" refer to a requirement manifest to the occupation as a whole, the qualifying words "bona fide" require an employer to justify the imposition of an occupational requirement on a particular individual when such imposition has discriminatory effects on the individual. (Bhinder at p. 208)

The instant situation is distinguishable from Bhinder. First, it is the provincial human rights legislation that is at issue, not the federal statute. The constructive discrimination provision in the new Code, section 10, with the 1986 amendments (not yet proclaimed in force), makes it clear that there is not a r.b.f.q. defence to indirect discrimination "unless ... the needs of the group of which the person is a member cannot be accommodated without undue hardship ... [on the employer]" (S.O. 1986, c.64, s.18(8)). Therefore, the issue in a Bhinder situation under the Ontario Code as amended would be whether the employer could successfully claim "undue hardship".

Even without the 1986 amendments to section 10, it is arguable that under section 10 of the new Code as enacted in 1982, it was necessary for an employer to prove "undue hardship" before an employer could establish that he could not reasonably accommodate, and hence, had a r.b.f.q. defence (see Cindy Cameron v. Nel-Gor Castle Nursing Home et al (1984) 5 C.H.R.R./2170, para. 18383.) It had also been held that this would be a requirement under the old Code as well. (See Singh v. Security and Investigation Services Ltd., unreported, Ontario Board of Inquiry (Cumming) 1977).)

O'Malley held that the old Code encompassed the notion of reasonable accommodation without undue hardship.

I have also expressed a view as to the proper interpretation of the "reasonable and bona fide in the circumstances "standard seen in section 10. In Morley Rand et al v. Sealy Eastern Limited, Upholstery Division, (1982) 3. C.H.R.R. D/938, at para. #8435, I stated:

> ... The "reasonable ... in the circumstances" standard of section 10 of the new Code embraces two facets - the employer must show not only that there is an objective, real need (it is "reasonable") for the general employment requirement that constructively discriminates against the particular employee, but also that this need of the employer cannot be met (in the circumstances, it is not "reasonable" to be able to do so) by an accommodation of the particular employee ...

In my opinion, the same two facets are present in the standard ("is a reasonable and bona fide qualification") set forth in section 23(1)(b), (even before the 1986 amendment to section 23, adding subsection 23(2)) in providing a defence to direct or intentional discrimination. That is, for Inco to successfully establish that gender discrimination through its restrictive employment policy "is a reasonable and bona fide qualification because of the nature of the employment", Inco must show first, that there is an objective real need (it is "reasonable") for the restrictive employment policy that discriminates, and second, that the need of the employer cannot be met in the particular circumstances, that is, there cannot be reasonable accommodation. Put otherwise, accommodation cannot be achieved without undue hardship to the employer. In my opinion,

Second, as I have stated, the issue in the instant situation involves direct or intentional discrimination under subsection 4(1) and section 8. In my opinion, this takes the instant situation out of the ambit of the Bhinder decision of the Supreme Court of Canada. The employment requirement here is intentionally directed at a specific group, being women of child-bearing potential.

The paragraph 23(1)(b) r.f.f.q. defence is now expressly qualified by the 1986 amendment (S.O. 1986, c.64, s.18(15), not yet proclaimed in force) seen in subsection 23(2).

> The ... board of inquiry ... shall not find that a qualification under clause 1(b) is reasonable and bona fide unless it is satisfied that the circumstances of the person cannot be accommodated without undue hardship on the [employer] ...

The situation before me as a Board of Inquiry arises in time periods when the old Code applies and then the new Code but before the 1986 amendment. In my view, the subsection 23(2) amendment was for greater certainty. I have held that under the old Code, once a prima facie case of discrimination has been established there is an inherent requirement of reasonable accommodation, and that the onus is upon the respondent to establish undue hardship in accommodating before the employer has a successful defence (Singh v. Security and Investigation Services Ltd., supra, at pp.32-34), approved by the Supreme Court of Canada on the issue of indirect discrimination being covered by the old Code in O'Malley v. Simpson-Sears Limited (1986) 7 C.H.R.R., D/3102 at para. 24771.) The Supreme Court of Canada in

this analysis is consistent with Etobicoke, supra, and follows the test set forth therein. Although the analysis also follows that seen in the dissenting opinion of Chief Justice Dixon in Bhinder, in my view, given the different wording of both the old Code and the new Code (and before the addition of subsection 23(2) in 1986) as compared with the federal statute being considered in Bhinder, the majority decision in Bhinder does not apply in the instant situation.

In the instant situation, the fact that the Complainant has the capacity to become pregnant does not in any way bear on her ability to perform any of the jobs in the plant. There is no question that Inco enacted its work requirement in good faith and in the sincerely held belief that the limitation upon women of "child-bearing potential" is necessary to protect fetuses. The discriminatory provision does not relate in an objective sense to the performance of the employment concurred. It is not reasonably necessary to assure the efficient and economical performance of the job without endangering the Complainant as an employee or her fellow employees or the general public. But is Inco's differential treatment "reasonably necessary" to protect a fetus? After giving due consideration to all of the evidence in the instant situation, I am of the opinion it is not reasonably necessary. This is not to say that an employment policy excluding women who are pregnant, or are actively endeavouring to become so, would not be a r.b.f.q.

There are two bases for saying that the employer, Inco, has not established a r.b.f.q. in the instant situation.

The first, more conservative approach, would say that the employer has a proper concern for the fetus and this will justify a restrictive employment policy. On this first approach, it is not simply a woman's choice to make herself as to whether a fetus will be put at risk by her actions. This is not the issue here. It is not simply a matter of the action (for example, by smoking) of the female person carrying the fetus putting the fetus at risk. In the instant situation, it is the activity of the employer, as well as that of the female employee, that puts the fetus at risk. Therefore, the employer in its own right can decide upon a restrictive employment policy as a safety measure for the benefit of the fetus, provided that the restrictive policy "is a reasonable and bona fide qualification because of the nature of the employment". On this approach, the risk of endangering a fetus due to the employer's activity ie. using toxic Nickel Carbonyl gas, is a proper matter of concern to the employer as well as to the female employee.

The question then under this first approach is simply whether the employer can establish an added risk to the fetus. In my view, there must be a real and significant risk in the circumstances for the restrictive policy to be "reasonable". In my opinion, given the evidence, there is no significant risk to a fetus from a female of child-bearing potential age working in Inco's IPC. First, with birth control, it is very unlikely she

will become pregnant. Second, if that unlikely event occurs, it is unlikely that she will become exposed to Nickel Carbonyl gas before she becomes aware of her pregnancy and locates herself elsewhere. Third, in the unlikely event she becomes pregnant and is exposed to the gas, it is doubtful there will be injury to the fetus. I prefer this first approach, and in any event, this case can be decided on the basis of this first approach.

The second approach would be to say that the question of assessment of risk to a fetus is simply a matter for the mother herself. (See, for example, Andrade, The Toxic Workplace: Title VII Protection For the Potentially Pregnant Person (1981) 4 Harv. Women's L.J. 41 at 92, cited by Swinton, supra at 63, 64.) Clearly, if this is the correct approach, then Inco has unlawfully discriminated in the instant situation, for the Complainant expressly wanted to work in Inco's IPC. However, competing with the freedom of choice of the worker is society's interest in the well-being of every child. As well, the employer has an interest in avoiding possible civil liability to a deformed child born after the exposure of the mother to a toxic substance in her place of employment. An American scholar has canvassed the problems and issues under consideration in a comprehensive article (see Wendy Williams, "Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII, (1981) 69 The Georgetown Law Journal 641). Professor Williams states:

> In the contest between the state and the woman, the interest in fetal life itself must yield to the woman's

> right of private choice prior to the time the fetus attains viability. It does not automatically follow, however, from that right of choice that there is a right to subject the fetus to any risk of harm, regardless of magnitude, short of termination. For example, a court probably would not hold unconstitutional a federal or state law that prohibits a woman from offering her fetus for in utero experiments that might pose a serious risk to the health of the fetus (at 652). In forging the dividing line between permissible intervention and maternal prerogative with respect to fetuses that will come to term, special caution is required to foreclose the possibility that the lives of women will become increasingly circumscribed, in and out of the workplace. The historical reduction of women's role in life to a single dimension -vessel and nurturer for the next generation - resulted in the sacrifice of tremendous human diversity of talent, predilection, and personal aspiration. To the extent restrictions are imposed today upon the normal, routine choices about women's work and nonwork lifestyles, such historical limitations upon women's lives are reimposed.
>
> All these considerations, taken together, suggest that an employer should not have an absolute right to express its interest in fetal health in any way it chooses and that the woman employee should not have an absolute right to choose the risk to which she will expose her fetus. The employer does, however, have a legitimate interest in fetal health that should be allowed some form of expression without liability under the equal employment opportunity laws. At the same time women workers have an interest in equal employment opportunity that is threatened by employer exclusionary policies. Women workers also have an interest in protecting their fetuses from harm while protecting employment rights. Thus, even if one accepts the employer premise that the choice presented is between the fetus' right to health and the women's right to employment, a look at the various interests involved suggests that some compromise of the competing interests should be sought in any resolution of the conflict under title VII 653.

In Caldwell v. Stewart (1985) 15 DLR (4th) 1, the Supreme Court of Canada considered the bona fide occupational qualification in the context of the British Columbia human rights legislation. The Complaint had been a practicing Catholic;

however, she entered into a marriage outside the Church with the result that her employer, a Catholic school board, terminated her teaching contract. The Court upheld the employer's interest in demanding that its Catholic employees adhere to Catholic tenets as a prerequisite to continued employment.

Of interest is the recent revision to radiation levels under the federal Atomic Energy Control Act, (R.S.C. 1970, c. A.-19). Under pressure from the Canadian Human Rights Commission for equality in employment, the Atomic Energy Control Board changed the radiation regulations so as to impose stricter dose limits only for pregnant women and not for all women of potential child bearing age. (Canadian Human Rights Commission Newsletter, January 1982; Canada Gazette, Part 2, April 9/85; Reg. #SOR 85-335, Atomic Energy Control Act, PC 1985-408, April 4/85). Professor Swinton explains the ramifications of such a switch in policy:

> The mother will now bear the burden of protecting the fetus, and she has the obligation to inform the employer if she is, or plans to become, pregnant. This recognition of individual autonomy is a major step forward for women, although it will not prevent indirect employer discrimination in the form of refusal to hire. It nevertheless increases an employer's difficulty in justifying total exclusion on the basis of sex as a bona fide occupational qualification. (Swinton, supra, at p. 55.)

In England this issue was debated in a report on equality and occupational health. (U.K. Equal Opportunities Commission, Health and Safety Legislation: Should We Distinguish Between Men and Women? (1979)). The United Kingdom Equal Opportunities Commission realized the need for differential treatment to

protect the fetus but recommended that the first consideration should be in setting levels to protect the most susceptible while preserving equal employment opportunities. (Health and Safety at p. 103-4)

E. Arbitration.

A related arbitration pertinent to the issue is Re General Motors of Canada and United Auto Workers, Local 222 (1979) 24 L.A.C. (2d) 388 (Palmer). The UAW attacked the General Motors rule excluding all women of child-bearing capacity from its battery department in order to avoid excessive exposure to lead. The UAW claimed this was contrary to the non-discrimination clause in the collective agreement as men with child-bearing capacity were not similarly excluded. Arbitrator Palmer rejected the union's submission, stating that in light of the medical evidence regarding fetal damage from lead exposure, the exclusionary policy for women is clearly reasonable. (Re General Motors of Canada & United Automobile Workers, Local 222, (1979) 24 L.A.C. (2d) 388 (Palmer) at 394). Arbitrator Palmer accepted the assertion that protection of the fetus is a legitimate concern of the employer although the narrower issue actually decided concerned only whether men should be given the same protection as women.

It is submitted, as mentioned above, that this approach allows systemic discrimination without weighing the risks involved. A society cannot eliminate all risks to human beings

in the workplace. The exclusionary policy in question endeavors to remove the risk by removing all women who could become pregnant. Equality and its corollary, freedom from discrimination, are important tenets of human rights which must not be violated without just cause. A report prepared for the Canadian Human Rights Commission by Marcia H. Rioux (M.H. Rioux, "Human Rights and Occupational Health and Safety" excerpted in "Safety and Risk" (1984), 2 Just Cause 13) acknowledges there is no such thing as a "no risk" situation and elaborates upon the type of question that should be asked to evaluate the reasonableness of exclusionary policies and their assault on equality;

> The question is not, therefore, is there a risk; rather the questions are, what is the risk, what is the reasonable probability of its occurrence and what are the circumstances under which more or less risk should be tolerated? (Rioux at p. 14.)

In essence, her analysis of the r.b.f.q. defense is consistent with Chief Justice Dickson's dissent in Bhinder, that is, that an assessment is required in each case of the effect of the r.b.f.q. on the complainant's individual rights.

> The establishment of bona fide occupational requirements ensures that the rights of the individual worker are balanced against the importance of overall health and safety in the workplace.
>
> The determination of a bona fide occupational requirement in the workplace involves two processes. First, there is risk evaluation which involves consideration of all the scientific evidence related to a hazard and the estimation of the risk it poses. Secondly, there is a determination of acceptable risk which involves a judgment of the social acceptability of demonstrated levels of risk. (Rioux at p. 14.)

The Tribunal in Mahon v. Canadian Pacific Ltd. (1986) C.H.R.R., D/3278), in a decision given just prior to the Supreme Court of Canada's decision in Bhinder, utilized an approach like that suggested by Chief Justice Dickson. An appeal was allowed, on the basis of the majority decision in Bhinder ((1987) 8 C.H.R.R. D/4263; application for leave to appeal to Supreme Court of Canada dismissed, November, 1987). However, Mahon, like Bhinder, involved the Canadian Human Rights Act. For the reasons I have given, supra, in my opinion both the old Code and the new Code mandate a consideration of the employer's exclusionary employment policy as it relates to the Complainant and the affected group she represents (women of "child-bearing potential"). Although the employer's policy might be reasonable with respect to one group, women who are pregnant, this does not mean that it automatically constitutes an r.b.f.q.. If the policy is over-inclusive, that is, it is not reasonable in applying to women who are not in fact pregnant but simply capable of becoming pregnant, then the restrictive policy is not a r.b.f.q. vis-a-vis that group. In my opinion, the majority reasoning in Bhinder does not apply to cases under Ontario human rights legislation. Rather, given the different wording of the provincial legislation, the reasoning of the minority in Bhinder is applicable.

The tribunal and court decisions regarding discrimination of persons with disabilities demonstrate that the risk of injury to the employee or others is a valid component of bona fide

occupational requirements. Although the Complainant in this case is not placing herself in danger there is the potential of third party harm but the risk is so small it must be asked whether the exclusionary policy is justified in light of equality objectives (see Air Canada v. Cason et al. (1985) 57 N.R. 221 at 235.) It is suggested by Rioux that "the danger must be both real and significant if differential treatment is to be justified". (Rioux at p. 14.) As Professor Swinton points out, the case for discrimination would be on more solid ground if both sexes bore a reproductive risk.

> If the Bhinder [Tribunal] approach were used in scrutinizing exclusion of all fertile women from a job in order to protect their health, the practice would be held illegal. The woman's freedom to choose would govern, rather than employer paternalism. This would be particularly true if male reproductive capacity was equally at risk with female reproductive capacity, for where both sexes are at risk but only one sex is 'protected' there appears to be discrimination. (Swinton at p. 63. At the Tribunal hearing of Bhinder it was held that Bhinder should be able to work without a hard hat as it only increased the risk of danger to himself and the increased risk was not large.)

It is recalled that Dr. Nieboer felt that the effect on male reproductive capacity could not be assumed negligible until further tests were conducted on the effects of exposure to nickel carbonyl gas. Overall, the medical evidence is inconclusive, but there is much less to suggest that male reproductive capacity is at risk than there is to suggest a fetus may be at risk. Inco could rely upon one scientific study (Exhibit #35) in asserting that male sperm is not affected by exposure to nickel carbonyl gas. As Professor Williams points out, there seem to be more

scientific studies undertaken in respect of women than men as to the effects of chemical exposure in the workplace (Williams supra, pp.665-666).

If one were to follow the Supreme Court majority's reasoning in Bhinder, the exclusionary policy in the instant situation arguably could be found to satisfy the Etobicoke test, on the basis that there is some risk to a fetus, however slight is the chance of there being a fetus and however slight is the chance that fetus might be exposed to carbonyl gas. The argument would follow that the consequential discrimination of women is permitted. Yet it is hard to justify the exclusion of almost all women from advancing in employment opportunity because of the small risk that a given female employee might become pregnant without knowing and at the same time be exposed to carbonyl gas. As I have stated, in my opinion the majority decision in Bhinder does not apply in the instant situation. Perhaps it is also arguable that an implicit factor to the Supreme Court's decision in Bhinder was that the incidence of discrimination was minimal based on the percentage of workers who are Sikhs affected by the hard hat rule. However, it is arguable that in the present fact situation the incidence of discrimination is broad, as it affects all women of child-bearing potential age, creating an unreasonable barrier to equality of opportunity. Relatively few women who are fertile in fact become pregnant in any year. (Williams gives the figure as approximately 9%, supra, at p.696.)

5. Undue Hardship and the Duty to Accommodate.

As the Complainant has established a prima facie case of discrimination on the basis of sex and the exclusionary policy does not constitute a r.b.f.q. because it bears no relation to the Complainant's ability to perform the job and the Complainant's personal safety and the safety of her fellow employees and the general public, is not in jeopardy, and the risk to a fetus is minimal or insignificant, it must then be asked whether the employer's duty to accommodate, that is, by employing women of child-bearing potential in the plant, would constitute undue hardship for the employer.

Once it is determined that the principle of equality is being offended by the over-inclusiveness of the exclusionary policy, the employer can plead undue hardship if it will suffer financially from accepting the risk of allowing women of potential child-bearing age to work in the plant.

The employer would argue that undue hardship would result in the form of possible prosecution for violating the duty under occupational health legislation. Under the Occupational Health and Safety Act, (R.S.O. 1980, c.321, paragraph 14(2)(g)) employers have a duty to take every precaution reasonable in the circumstances to protect workers. However, if the employer conforms with existing regulations or guidelines no prosecution will ensue where the employee contracts an industrial disease because of a special sensitivity.

The "Code for Medical Surveillance for Lead", published by the Ministry of Labour, Occupational Health and Safety Division for Ontario, establishes actionable levels of lead in the blood, with the same level being used for men and women without distinction. (See generally Swinton, supra at 45-59.)

Another argument of undue hardship is that the employer may experience higher worker compensation premiums as a result of increased claims. This proposition was dealt with in the Bhinder case at the Tribunal level (at paragraph 5332(36)),

> "the increased burden on the accident fund of the workers' compensation scheme in Ontario would be absorbed across all industries and the consequential impact upon an individual employer would be very small, that is, the cost consequences are de minimis".

Professor Swinton suggests, however, that this analysis ignores the deterrent function of workers compensation schemes.

> The board of inquiry gave insufficient weight to this deterrence function and to the impossibility of providing a fully safe workplace so as to obviate the need for protective equipment. In a workplace with toxic substances, hazards may not be controllable to the level needed to protect a susceptible group. To say that the employer will just have to pay them compensation conflicts with the prevention goal of workers' compensation. (Swinton at p.64.)

However, the Tribunal in Bhinder was not suggesting that the employer needs only "to pay [employees] compensation"; rather, the Tribunal was stating that the safety equipment makes good sense generally, however, given the small risk, the employee's right to practice his religion outweighs the potential cost to the industry. Once again, if reproductive damage was a risk for both sexes, the employer could not justify protecting only one

sex under the guise of lowering worker compensation claims. In the Bhinder case, the Supreme Court found that there was no duty to accommodate on the part of the employer when a r.b.f.q. exists, and hence the argument of possible increased claims in respect of workmen compensation was not discussed in the context of undue hardship. However, as already discussed, it is arguable that the inclusion of "reasonable" in the new Code's definition of a bona fide occupational qualification imports a clear duty to accommodate unless there is undue hardship.

The employer could also argue undue hardship in that tort liability may ensue in respect of an unborn child deformed as a result of the mother's exposure to hazardous materials in the workplace. (See Swinton, supra at 65-67; Williams supra at 645-646.)

The possibility of the mother waiving the child's right to sue is unlikely as there is a conflict of interest between parent and child in the toxic workplace where the mother consents to risking exposure.

In Ontario a child has the right to sue for pre-natal injury: section 67 of the Family Law Reform Act, R.S.O. 1980, c.152. However, in England the opposite view has been statutorily implemented by subsection 1(6) of the Congenital Disabilities (Civil Liability) Act, 1976, c. 28. This section provides that the mother's contractual waiver of liability in respect of the child, and the mother's voluntary assumption of risk, binds the child.

At least one American court has suggested that the remote potential exposure of the employer to tort liability should not, by itself, provide a justification for interference with the right to equality of opportunity in employment. See Hayes v. Shelby Memorial Hospital, (1984) 726 F.2d. 1543, at p.1552 fn. 15. However, other U.S. courts have held that a concern on the part of the employer for future liability is proper. See Doerr v. B.F. Goodrich (1979) 484 F.Supp 320, at 325, fn.3 (Ohio District Crt.)

Professor Swinton considers the threat of a lawsuit and suggests:

> The concerns of the employer that an action might ensue might justify exclusion of the pregnant woman as a bona fide occupational qualification. It is more difficult to justify the exclusion of a woman capable of bearing children but not intending to do so; the risk of a law suit, if a woman accidentally becomes pregnant and decides to bear the child, is minimal. When one weighs the interests of women generally and equality objectives, the defence is difficult to sustain. Similarly, exclusion because of fear of a lawsuit based on pre-conception injury is difficult to justify, since the lawsuit's success is unlikely. (Swinton at p. 67.)

Returning to the facts of this case and in light of the uncertainty of the medical evidence, it is observed that the probability of the two events coinciding, an unplanned pregnancy and a hazardous nickel carbonyl gas leak, is quite small. Furthermore, it is not at all certain that fetal injury will result if such unlikely events occur. Such a small risk does not warrant blanket discrimination on the basis of sex, affecting all women from their early teens until the late forties, and the consequential denial of equality of opportunity in employment.

The legitimate concerns of the Respondent with respect to fetal risk could be met by providing full information to female employees, recommending the use of a reliable method of birth control, advising against becoming pregnant while employed in the IPC workplace, and providing the option to transfer to a carbonyl-free area of the workplace upon intending to become pregnant, without disadvantage in terms of earnings, benefits and seniority. Inco made it clear in the testimony of its management that it would be quite willing to accommodate female employees in respect of alternative work being made available, upon an employee indicating she intended to become pregnant.

Inco asserts that it should be able to adopt a very restrictive policy, out of abundant caution. Just as its safety engineering should minimize risk, Inco asserts its employment policies should minimize risk as much as humanly possible, even if the risk is minimal at the outset. Inco's position is that it should seek to preclude any possibility of risk.

Much of the evidence went to the issue as to whether the scientific evidence supported the view that carbonyl gas constitutes a significant risk to the fetus, or supported the opposing view that only a relatively minor risk is present. This is a difficult question for scientists, let alone for a lay Board of Inquiry. My own assessment of the evidence is that the scientific opinions (Drs. Nieboer, Spielberg and Halton in particular) suggesting the risk is insignificant, are to be preferred. Having said that, I would add, however, that an

employer in Inco's position could reasonably assert that on the basis of the scientific literature there is certainly a possibility of harm to a fetus from exposure to carbonyl gas.

However, in my opinion the resolution of this specific question (the potential for harm to a fetus by exposure to nickel carbonyl gas) is not really determinative of the larger issue, in any event. In my view, the risk of a female employee becoming pregnant while practicing a reliable method of birth control is very minimal, and the risk of having an unintended pregnancy not yet realized and suffering an exposure to carbonyl gas (which in itself is very unlikely) during that short period of time, result in rendering the overall risk unsubstantial and minimal. When one then considers the further point, as I find on the evidence, that it is very uncertain that exposure to nickel carbonyl gas to a fetus would be harmful, then the already minimal risk is rendered even more insignificant.

This is a case of conflicting interests, claims and values. In my opinion, considering all the evidence 'reasonableness' applied to the instant factual situation dictates a balancing of the interests between fetal protection and a female employee's right to equality of opportunity in employment, in favour of the Complainant and not the employer.

It is more in keeping with equality objectives to allow the individual the informed choice of accepting the very slight risk or rejecting the very slight risk in favour of alternative employment. In the instant situation, the Complainant testified

she is using birth control and does not intend to become pregnant.

If such exclusionary rules of a discriminatory nature are considered warranted it is within the realm of the role of government to make such a policy decision, and to enact regulations as seen under the federal Atomic Energy Control Act, discussed above. In the absence of such regulations, it is suffice for Inco to give full information regarding the potential risk to prospective female employees, require an assurance that a reasonable method of birth control is being used, and then allow the woman herself to decide whether to expose herself to the risk. The management of Inco testified that they would be able to accomodate a woman who became, or stated she had an intention of becoming, pregnant, through a transfer to an area out of the IPC.

In my opinion, and I so find on the evidence, the Respondent has unlawfully discriminated against the Complainant because of her sex in contravention of paragraphs 4(1)(c), (e) and (g) of the Ontario Human Rights Code R.S.O. 1980, c.340 as amended, while that Code was in force to June 14, 1982, and has unlawfully discriminated against the Complainant because of her sex in contravention of subsection 4(1) and section 8 of the Human Rights Code, 1981, S.O. 1981, c.53, as amended, since it came into force June 15, 1982.

she is using birth control and does not intend to become pregnant.

If such exclusionary rules of a discriminatory nature are considered warranted it is within the realm of the role of government to make such a policy decision, and to enact regulations as seen under the federal Atomic Energy Control Act, discussed above. In the absence of such regulations, it is suffice for Inco to give full information regarding the potential risk to prospective female employees, require an assurance that a reasonable method of birth control is being used, and then allow the woman herself to decide whether to expose herself to the risk. The management of Inco testified that they would be able to accomodate a woman who became, or stated she had an intention of becoming, pregnant, through a transfer to an area out of the IPC.

In my opinion, and I so find on the evidence, the Respondent has unlawfully discriminated against the Complainant because of her sex in contravention of paragraphs 4(1)(c), (e) and (g) of the Ontario Human Rights Code R.S.O. 1980, c.340 as amended, while that Code was in force to June 14, 1982, and has unlawfully discriminated against the Complainant because of her sex in contravention of subsection 4(1) and section 8 of the Human Rights Code, 1981, S.O. 1981, c.53, as amended, since it came into force June 15, 1982.

ORDER

This Board of Inquiry having found the Respondent, Inco, to be in breach of paragraphs 4(1)(c),(e) and (g) of the Ontario Human Rights Code, R.S.O. 1980, c.340, as amended, and subsection 4(1) and section 8 of the Ontario Human Rights Code, 1981, S.O. 1981, c.53, proclaimed in force June 15, 1982, as amended, in respect of the Complainant, Ms. Laurene Wiens, for the reasons given, this Board of Inquiry orders the following:

1. The Respondent will provide, as quickly as possible, the Complainant with all the additional training (the second stage training) necessary to qualify the Complainant for employment in the Respondent's IPC sector of its operations at its Copper Cliff nickel refinery and upon successful completion of such training, the Complainant will be awarded the first available employment position in the IPC, excluding any consideration of seniority and notwithstanding any provisions of any Collective Bargaining Agreement.

2. The Respondent shall discontinue and abandon forthwith its present employment policy of excluding women of child bearing potential from the IPC sector of its operations at its Copper Cliff nickel refinery.

Dated at Toronto this 9th day of February, 1988.

Peter A. Cumming
Board of Inquiry